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No. _____

In The

Supreme Court of the United States

October Term, 1998

MARVIN O. ROSS,

Petitioner,

v.

INDIANA STATE TEACHERS ASSOCIATION and INDIANA STATE TEACHERS ASSOCIATION INSURANCE TRUST,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. What weight, if any, should be given to a person's actions or statements in seeking or receiving disability insurance benefits when that person asserts that he is a "qualified individual with a disability" under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101, *et seq.*

2. Whether an employee welfare benefit plan governed by the Employee Retirement Income Security Act of 1974 ("ERISA"), 42 U.S.C. § 1001, *et seq.*, may deny a disabled individual long-term disability benefits by invoking the provisions of the Americans With Disabilities Act and thereby conclude that the employee is required to return to work based on ADA accommodations proposed by his employer, despite the absence of any reference to the ADA or to accommodations in the express written terms of the plan itself, and in the absence of a formal amendment to the plan providing notice to the beneficiary that such accommodations would be considered in determining whether the employee was disabled under the ERISA plan.

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PETITION FOR A WRIT OF CERTIORARI

Mr. Marvin O. Ross respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit which gives rise to this Petition was entered on September 3, 1998, will be reported in the Federal Reporter, Third Series, is available at 1998 WL 560238, and is reprinted in the Appendix hereto at A-1. The opinion affirmed a decision of the U.S. District Court for the Northern District of Indiana which is reported at 955 F. Supp. 1025 and reversed a decision of the same district court for the Northern District of Indiana which is reported at 973 F. Supp. 837. Those two decisions are reprinted in the Appendix hereto at A-39 and A-56, respectively.

BASIS FOR JURISDICTION

The court of appeals entered its opinion on September 3, 1998. App., *infra*, at A-1. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The federal statutes involved in this appeal are the Employee Retirement Income Security Act of 1974

("ERISA"), 29 U.S.C. § 1001, *et seq.*, and the Americans With Disabilities Act ("ADA"), 42 U.S.C. § 12101, *et seq.*, and any pertinent portions of these statutes are correctly set forth in the Petition.

STATEMENT OF THE CASE

On July 27, 1995, the Petitioner, Marvin O. Ross ("Ross"), filed suit in the Northern District of Indiana against the Indiana State Teachers Association ("ISTA"), his former employer, and the Indiana State Teachers Association Insurance Trust ("ISTA Trust"), alleging violations of the Americans With Disabilities Act ("ADA"), 42 U.S.C. § 12101, *et seq.*, and the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, *et seq.*, along with several pendent state claims. App., *infra*, at A-39. The jurisdiction of the district court was invoked pursuant to those two federal statutes and pursuant to 28 U.S.C. § 1331 (general federal question jurisdiction). Upon disposition of the matters in the district court, the Court of Appeals for the Seventh Circuit assumed jurisdiction pursuant to 28 U.S.C. § 1291.

A. Facts Material to the Consideration of the Questions Presented

This appeal arises from the efforts of the Petitioner, Marvin O. Ross ("Ross"), who suffers from a disabling orthopedic condition, to exercise rights guaranteed to him under the ADA and to obtain relief from his long-term disability plan administered by the ISTA Trust. From 1971 until his termination in December, 1994, Ross

worked for the ISTA, a union representing teachers throughout the state of Indiana. App., *infra*, at A-3. As UniServ Director for Fort Wayne, Indiana, Ross represented the Fort Wayne Education Association and its teacher members by providing advice and consultation to them regarding employment matters. *Id.* at A-3 to A-4. Since 1958, Ross has suffered from a degenerative hip condition and has endured several operations. *Id.* at A-4. In September, 1992, Ross was placed on indefinite sick leave for hip pain and in February, 1993, underwent a second total hip replacement. *Id.* at A-57 to A-58. In March, 1993, Ross applied for and was approved for long-term disability benefits by the ISTA Trust. *Id.* at A-58. In July, 1993, Ross was granted disability benefits by the Social Security Administration. *Id.*

In February, 1994, the ISTA Trust began to question whether Ross was still entitled to disability benefits. *Id.* at A-6 to A-7. At some point thereafter, the ISTA Trust took the position that Ross was no longer disabled under the terms of the disability plan and notified him on October 11, 1994, that the Trust was terminating his benefits as of October 31, 1994. *Id.* at A-7 to A-8.

Faced with the termination of his disability benefits, Ross attempted to return to work and therefore inquired whether his employer, the ISTA, would accommodate his disability. *Id.* at A-9, A-52. While Ross was attempting to reach a consensus with his employer on accommodations, Ross proceeded to appeal of the denial of his disability benefits. Although Ross requested that the ISTA postpone any decision as to his employment status until the ISTA Trust had ruled on his appeal, the ISTA would not wait and instead required that Ross return to work with a

written release from his physician stating that Mr. Ross would be able to return to work and perform all of the essential functions of his position as UniServ Director without posing a threat of harm to himself or other ISTA employees. *Id.* at A-11 to A-12. Although some accommodations had been agreed to by the ISTA, there had been no final agreement and no preparations had been made to implement any of the modifications ISTA proposed to prepare the workplace for Mr. Ross. *Id.* When Ross could not provide the requested letter, he was terminated by the Executive Director of the ISTA. *Id.*

After he was terminated by the ISTA, Ross continued to pursue his appeal of the ISTA Trust's denial of his disability benefits. Ross argued that he met the definition of "totally disabled" under the express terms of the plan which defined "totally disabled" as "disabled and unable to perform the substantial duties of the Participant's employment." *Id.* at A-12, A-68. However, at the appeal hearing, Doyle McAllister, the ISTA's Assistant Executive Director, appeared at the behest of the Chief Executive Officer of the ISTA Trust, Bruce Rogers (who was also an officer of the ISTA), and presented new evidence to the Trustees that the ISTA would do what was necessary to accommodate Ross to allow him to return to work. *Id.* at A-61 to A-62. Neither Mr. McAllister, Mr. Rogers, nor anyone else informed the Trustees deciding the case that Ross had not in fact been accommodated but had, instead, been fired by the ISTA. *Id.* at 62. On February 21, 1995, the ISTA Trust concluded that Ross was not disabled under the terms of the plan, finding that with ISTA's accommodations Ross could perform the substantial duties of his employment. *Id.* at A-71.

B. Summary of the Proceedings Below

On July 27, 1995, Mr. Ross filed suit in the Northern District of Indiana against the ISTA and the ISTA Trust, alleging violations of the ADA and ERISA and several pendent state law claims. App., *infra*, at A-2. On February 7, 1997, the district court granted summary judgment to the ISTA on Ross's ADA claim and dismissed the remaining state law claims against ISTA without prejudice under 28 U.S.C. § 1367(c). *Id.* at A-55. In its decision, the district court reasoned that

> [a]lthough Ross's disability benefits were terminated because the Trust determined he was no longer totally disabled, Ross has consistently held the position that he was entitled to the benefits. He cannot simultaneously argue that he is capable of performing the essential functions of his job. Thus, no genuine issue of fact exists as to whether Ross was a qualified individual with a disability; he was not.

Id. at A-54.

In April, 1997, Ross proceeded to trial against the ISTA Trust on the issue of whether the Trustees abused their discretion in denying him long-term disability benefits. Following a bench trial, the district court ruled in favor of Ross finding that "[t]his decision is on all fours with a decision from the Ninth Circuit, *Saffle v. Sierra Pacific Power Co. B[argaining Unit Long Term Disability Income Plan]*, 85 F.3d 455 (9th Cir. 1996), in which the plan administrator read the phrase 'completely unable to perform each and every duty of his regular occupation' to include 'even with reasonable accommodation.' " *Id.* at A-65. In finding that the ISTA Trust abused its discretion

by considering evidence of proposed accommodations, the court also relied on *Swaback v. American Information Technologies Corp.*, 103 F.3d 535 (7th Cir. 1996), for the proposition that "if fiduciaries or administrators of an ERISA plan controvert the plain meaning of a plan, their actions are arbitrary and capricious." App., *infra*, at A-64 (quoting *Swaback*, 103 F.3d at 540). The district court concluded that

> [n]o average individual, upon reading the phrase "unable to perform the substantial duties of the Participant's employment," would immediately understand that to require that the Participant be unable to perform the substantial duties with or without reasonable accommodation. The reasonable accommodation requirement which the Trustees have constructed is not part of the plain language of the plan, and no average individual would read it as such.

Id. at A-65. This decision was appealed by the ISTA Trust. At the same time, Ross filed a cross-appeal of the district court's decision granting summary judgment to the ISTA.

In the appeals court, the Seventh Circuit reversed the district court as to the ERISA claim finding that it was not an abuse of discretion for the ISTA Trust to consider actual accommodations offered to Ross by the ISTA in deciding whether Ross was disabled under an ERISA plan which defines total disability as "unable to perform the substantial duties of the Participant's employment." *Id.* at A-27, A-5. The court relied on *Gallo v. Amoco Corp.*, 102 F.3d 918 (7th Cir. 1996), *cert. denied*, ___U.S. ___, 117 S. Ct. 2532, 138 L. Ed. 2d 1031 (1997), for the proposition that since the plan terms did not answer the question of

whether the Trustees could consider accommodations offered by the ISTA, the plan administrator has discretion to interpret the plan. App., *infra*, at A-25 (citing *Gallo*, 102 F.3d at 922).

Saffle, the Seventh Circuit reasoned, "does not suggest that it is inappropriate to consider accommodations actually offered to an employee to determine whether he is able to perform the substantial duties of his regular job." *Id.* at A-26. The court distinguished *Saffle* since it found the accommodations in *Saffle* "were essentially outside of the realm of Saffle's regular job and therefore were at odds with the policy language at issue" which limited a person's duties to her "regular job." *Id.*

On the ADA issue, the Seventh Circuit denied Ross's appeal and affirmed the district court. The court found that the interactive process broke down and that no reasonable trier of fact could blame the breakdown on the ISTA. *Id.* at A-33. The district court had not reached that question on summary judgment noting that "this court would be hard pressed to say which side was more at fault." *Id.* at A-52. Having made its finding, the Seventh Circuit noted that Ross had not demonstrated that he was willing to return to work on the ISTA's terms. *Id.* at A-35. The court concluded that

> Mr. Ross has maintained, throughout this litigation, that he was totally disabled, unable to return to work and therefore entitled to long-term disability benefits. Given his consistent position that he is totally disabled, taken together with the evidence regarding his requested accommodations, it appears clear to us that Mr. Ross has not established a genuine

> issue of fact regarding whether he was able to perform the essential functions of his position with reasonable accommodation.

Id. at A-36 to A-37.

REASONS FOR GRANTING THE PETITION

This appeal raises two compelling issues which spring from the interplay between two important statutes, the ADA and ERISA, the provisions of which extend vital protections to American workers. This case raises the significant issue of whether an employee's attempt to seek benefits under the Social Security Act or through private insurance plans governed by ERISA will thereafter preclude or severely prejudice that employee from successfully asserting his rights under the ADA. This case also presents the important issue of whether an ERISA employee welfare benefit plan may deny an otherwise disabled employee long-term disability benefits based on proposed ADA accommodations where the employee benefit plan does not explicitly permit any such accommodations to be considered.

A. Since Ross Presents an Important Question Which Is Virtually Identical to One Which This Court Has Recently Determined Should Be Reviewed on Certiorari, the Court Should Review the Substantial Issue Raised Herein.

Ross's petition should be granted as to the first question presented since this issue is virtually identical to a question which this Court will address in *Cleveland v.*

Policy Management Systems Corp., 120 F.3d 513 (5th Cir. 1997), *cert. granted*, 119 S. Ct. 39 (1998).

In that case, this Court granted certiorari limited to two questions:

> 1. Whether the application for, or receipt of, disability insurance benefits under the Social Security Act, 42 U.S.C. § 423, creates a rebuttable presumption that the applicant or recipient is judicially estopped from asserting that she is a "qualified individual with a disability" under the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101, *et seq.*
>
> 2. If it does not create such a presumption, what weight, if any, should be given to the application for, or receipt of, disability insurance benefits when a person asserts she is a "qualified individual with a disability" under the ADA.

Cleveland, 119 S. Ct. at 39. The second question this Court will examine in *Cleveland* is virtually identical to the first question presented for review by Mr. Ross, namely, what weight, if any, should be given to a person's actions or statements in seeking or receiving disability insurance benefits when that person asserts that he is a "qualified individual with a disability" under the ADA.

In this case, the courts below appear to have afforded dispositive weight to Mr. Ross's efforts to seek Social Security and other disability benefits in determining whether Mr. Ross was a "qualified individual with a disability," protected under the ADA. The district court

specifically based its decision granting summary judgment to the ISTA upon the supposed inconsistency between his seeking disability benefits under his ERISA plan and also seeking to enforce his rights under the ADA. *See* App., *infra*, at A-53 to A-54. The Court of Appeals, in affirming the district court, described that court's rationale:

> The district court concluded that there was no genuine issue of material fact with respect to whether Mr. Ross was a "qualified individual with a disability," and concluded that he was not such an individual because he was not capable of performing the essential functions of his job. The district court based this decision on the ground that, because Mr. Ross maintained throughout the litigation that he was totally disabled and was entitled to long-term disability benefits under the Trust's policy, he could not "simultaneously argue that he is capable of performing the essential functions of his job."

Id. at A-14 (quoting *Ross I*, 955 F. Supp. at 1032 (A-54)). In concluding that the district court's grant of summary judgment was proper, the court of appeals essentially adopted the district court's rationale:

> Mr. Ross has maintained, throughout this litigation, that he was totally disabled, unable to return to work and therefore entitled to long-term disability benefits. Given his consistent position that he is totally disabled, taken together with the evidence regarding his requested accommodations, it appears clear to us that Mr. Ross has not established a genuine issue of fact regarding whether he was able to perform the essential functions of his position

> with reasonable accommodation. Consequently, we affirm the district court's decision to grant summary judgment to ISTA on the ADA claim on this ground.

Id. at A-36 to A-37. Without expressly invoking the term "estoppel" with respect to Mr. Ross's conduct, the Seventh Circuit afforded preclusive weight to the fact that he has attempted to obtain disability benefits. The Seventh Circuit did not discuss the precise question raised on summary judgment, namely whether, viewing the evidence in the light most favorable to Mr. Ross, Ross presented sufficient evidence to raise a question of fact as to whether he was a "qualified individual with a disability." Although the court of appeals noted that Ross had set forth evidence which was contrary to the ISTA's assertion that Ross was not a "qualified individual," including statements by officers of the ISTA itself, *see* A-34 to A-35, both the Seventh Circuit and the district court treated Mr. Ross's claim for disability benefits as outcome determinative, equating Mr. Ross's position that he was entitled to benefits under the terms of his disability policy with a binding admission that he could not be accommodated.

In addition, the Seventh Circuit's decision on both the ADA issues and, as discussed below, on the ERISA issues, will force disabled persons to confront the "untenable" choice, condemned by other circuit courts of appeal, namely, to choose between badly needed disability benefits or an ADA action which may take years to resolve. *See, e.g., Johnson v. Oregon*, 141 F.3d 1361, 1368 (9th Cir. 1998) (quoting *Swanks v. Washington Metropolitan Transit Authority*, 116 F.3d 582, 586 (D.C. Cir. 1997)). Here,

by the time Mr. Ross had filed suit, the ISTA had terminated him (asserting that he was not a qualified individual with a disability under the ADA) and the ISTA Trust had denied his disability benefits appeal (asserting that, with ADA accommodations, he could do his job). Faced with these unthinkable circumstances, and given the conclusion of numerous courts that the standards for disability benefits and relief under the ADA are distinct, it is certainly not self-evident, as the Seventh Circuit appears to have assumed, that it was unreasonable and fatally contradictory for Mr. Ross to seek relief under both ERISA and the ADA. Moreover, this Court has on previous occasions refused to apply the doctrine of election of remedies where independently enforceable rights were at issue. *See, e.g., Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 49-50 (1974). Neither Ross nor other disabled employees in his position should be compelled to abandon rights under one federal statute in order to attempt to enforce rights under another. On that basis alone, the Court should grant the petition because under the lower courts' reasoning Mr. Ross has, in effect, been treated as a pariah, a member of a class of otherwise qualified individuals whose rights under the ADA are severely truncated or perhaps non-existent. Like Mr. Ross, one can earn membership in this outcast group merely by asserting disability benefits rights under various federal statutes, such as ERISA or the Social Security Act.

Whatever sense of public policy is driving the reasoning of the lower courts in this case, it is impossible to discern any Congressional intent to achieve such a result in ERISA, the Social Security Act, or the ADA. Certainly, it is difficult to find in the Congressional findings and

purpose contained in the ADA itself any support for the proposition that a disabled individual must first renounce his or her entitlement to disability benefits if the intent is to rejoin the workplace and invoke the protections of the ADA. *See* 42 U.S.C. § 12101. Mr. Ross's case amply illustrates the Catch-22 which the lower courts' reasoning creates.

Here, Mr. Ross received disability benefits from the ISTA Insurance Trust for approximately 18 months. When the ISTA Trust determined to cancel Mr. Ross's benefits, Mr. Ross initiated an appeal to the Board of Trustees, and at the same time sought to return to employment with accommodations under the ADA in order to provide for his family. After he was fired by the Executive Director of the ISTA, his disability benefit appeal was denied by the Board of Trustees of the ISTA Trust. The ISTA Trust based its decision on the testimony of the Assistant Executive Director of the ISTA who claimed that Mr. Ross would be accommodated under the ADA. The court of appeals then upheld this decision as a permissible interpretation of the ERISA plan; but the Seventh Circuit also upheld the ISTA's assertion that Mr. Ross in fact had no rights under the ADA because he has maintained in this litigation that he was totally disabled under the ISTA Trust plan, *i.e.*, because he sought to enforce his rights under ERISA as well. If the courts below are correct, disabled employees will need to acquire a remarkable precognitive ability to determine, very early on, whether they are more likely to be able successfully to enforce their ERISA rights or their ADA rights; they certainly cannot do both if the decisions below stand. Imposing this additional highly technical

burden on disabled individuals is plainly not consistent with the purposes of the ADA.

The Court of Appeals' opinion in this case means that an employee in Mr. Ross's position may never attempt to vindicate ERISA disability benefit rights as well as his ADA rights in one proceeding. Mr. Ross has always asserted that he is entitled to disability benefits under the terms of his ERISA plan, that he is also entitled to relief under the ADA, and that there is no necessary inconsistency in these claims. *See, e.g., Johnson v. Oregon*, 141 F.3d 1361, 1366-68 (9th Cir. 1998). After all, the ADA does not *require* disabled individuals to seek employment. Rather, it provides them with the option to seek employment free from disability-based discrimination. In this case, the "inconsistency" which the appeals court discerned between Mr. Ross's ERISA claim and his ADA claim first arose when the ISTA Trust decided to "interpret" the "total disability" requirement in the ERISA plan as also requiring a claimant to establish that he could not be reasonably accommodated under the ADA, although the plan itself says nothing of the sort. This brand new "interpretation" was made just two months after the ISTA had terminated Mr. Ross.

Adopting the ISTA Trust's faulty interpretation of the plan, the court of appeals apparently concluded that Mr. Ross's assertion that he is totally disabled under the terms of his ERISA plan was identical to an admission that he could not be reasonably accommodated. But this conclusion assumes that Ross must also agree with the ISTA Trust's definition of "total disability," a remarkable assumption since Ross adamantly disputes the Trust's decision. As discussed below, Ross maintains that the

"total disability" condition to benefits must be determined based on the language of the plan itself and without regard to any ADA accommodations, particularly where the ISTA Trust failed to amend the plan to incorporate the terms of the ADA into its definition of "total disability." *See Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 83 (1995) (noting that "one of ERISA's central goals is to enable plan beneficiaries to learn their rights and obligations at any time" and that pursuit of this goal is "built around reliance on the face of written plan documents"). Here, the court of appeals has sanctioned the rewriting of the plan and, in effect, estopped Mr. Ross based on its misconception that "total disability" under an ERISA plan necessarily excludes protection under the ADA.

While erroneous as to Mr. Ross, more importantly, the Seventh Circuit's opinion jeopardizes the rights of all other disabled Americans who are faced with the dilemma of having to choose between attempting to secure a remedy under either the ADA *or* ERISA (but not both), rather than risk the danger of walking away, like Mr. Ross, without *any* remedy. It is therefore vital for this Court to clarify the appropriate interplay, if any, between these two statutes to ensure that disabled people are uniformly treated. Accordingly, the petition for a writ of certiorari should be granted as to the first question presented since a virtually identical question is already pending before this Court in *Cleveland*[1] and since the

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[1] Even if this Court does not grant the petition in this case, at the very least the Court should postpone consideration of the petition until *Cleveland* has been decided and then make

issues are clearly important to the proper enforcement of the ADA.

B. Since the Second Question Presented Here Is the ERISA Counterpart to the ADA Issue Raised in *Cleveland* and Is Similarly Important, the Court Should Grant the Petition.

The second issue raised by Mr. Ross is a counterpart to the question presented above which is already before this Court in *Cleveland* and provides this Court with an opportunity to clarify the interplay, if any, between the ADA and ERISA in the context of the "interpretation" of an ERISA welfare benefit plan. Whereas *Cleveland* involves the preclusive effect or weight to be afforded to statements regarding the application or receipt of disability benefits in the context of an ADA claim, this case also presents the companion issue of the extent to which the trustees of an ERISA plan may invoke the ADA as grounds for denying disability benefits, where the terms of the plan do not explicitly permit the trustees to do so and where the ERISA plan provided no notice to its employee beneficiaries that by seeking to exercise their rights under the ADA, those employees may prejudice (or even extinguish) their rights to plan benefits. Clearly, this is an issue of far-reaching import, potentially affecting all persons who may claim disability benefits under an ERISA plan.

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summary disposition of the case in accordance with that decision. *See, e.g., Keney v. New York*, 388 U.S. 440, 440 (1967); *see also* ROBERT L. STERN ET AL., SUPREME COURT PRACTICE § 5.09 at 243-44 (7th ed. 1993).

Reversing the district court, the appeals court in this case held that it was within the discretion of the ISTA Trust to interpret the definition of long-term disability as incorporating ADA accommodations, despite the fact that the plan itself was silent on the issue.[2] In its ruling, the Seventh Circuit panel held that a contrary ruling by the Ninth Circuit Court of Appeals was distinguishable.

However, the Seventh Circuit's attempts to distinguish *Saffle v. Sierra Pacific Power Co. Bargaining Unit Long Term Disability Income Plan*, 85 F.3d 455 (9th Cir. 1996), are unconvincing. The Seventh Circuit recognized that in *Saffle* the Ninth Circuit held that the plan could not interpret the term "regular occupation" to include other work for which Saffle was qualified. App., *infra*, at A-26. However, the Seventh Circuit then held that *Saffle* "does not suggest that it is inappropriate to consider accommodations actually offered to an employee to determine whether he is able to perform the substantial duties of his regular job." *Id.* The court then characterized the Ninth Circuit's decision as one in which "[t]he problem in *Saffle* with the accommodations that were considered was that they were essentially outside the realm of Saffle's regular job and therefore were at odds with the policy language at issue." *Id.* However the Ninth Circuit's decision is not as narrow as the Seventh Circuit claims. Ultimately, *Saffle* rests on

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[2] The plan provided in pertinent part:

> Total Disability (or "Totally Disabled") for the first sixty (60) months of disability means that the Participant is disabled and unable to perform the substantial duties of the Participant's employment.

App., *infra*, at A-68.

the court's fidelity to the principle that an ERISA administrator "lacks discretion to rewrite the Plan." *Saffle*, 85 F.3d at 460 (citations omitted). If not a direct conflict with *Saffle*, as demonstrated below, the Seventh Circuit's approach is clearly, at the very least, a conflict in principle and is clearly inconsistent with the precedents relied on in *Saffle*.

In *Saffle* the Ninth Circuit examined "the Committee's interpretation of the Plan's definition of 'total disability' to include accommodations that could be made in Saffle's current job, and of the clause 'completely unable to perform each and every duty of his regular occupation' to mean 'the inability to perform substantial portions of the employee's regular job.' " *Id.* at 458. In deciding the specific question of whether the phrase "completely unable to perform" could be interpreted to mean "even with reasonable accommodations," the Ninth Circuit held that it could not since the definition of "total disability" "does not talk in terms of accommodation at all." *Id.* at 459. The court further noted that such a construction "effectively imposes a new requirement for coverage." *Id.* at 459-60. Since an administrator does not have the discretion to rewrite the plan, the administrator's construction was arbitrary and capricious. *Id.* at 460 (citing *Florence Nightingale Nursing Serv., Inc. v. Blue Cross/Blue Shield of Alabama*, 41 F.3d 1476, 1484 (11th Cir.) (holding that a "claims administrator's decision is arbitrary and capricious where new requirements for coverage are added to those enumerated in the plan"), *cert. denied*, ___ U.S. ___. 115 S. Ct. 2002, 131 L. Ed. 2d 1003 (1995); *Jones v. Laborers Health & Welfare Trust Fund*, 906 F.2d 480, 482 (9th Cir. 1990) (administrator acted within its discretion

because no new limitation was incorporated into the plan)).

The Seventh Circuit dismissed this principle claiming that it applies only in situations where accommodations are "outside the realm" of an employee's regular job. But the appeals court did not address the language cited above which clearly indicates that the Ninth Circuit took a broader approach. Nor does the Seventh Circuit explain how *Saffle* is distinguishable where the Ninth Circuit explicitly noted that the gloss put on the definition of "total disability" was impermissible since the written plan definition "d[id] not talk in terms of accommodation at all." *Id.* at 459. Quite simply, *Saffle* is indistinguishable on this point: may a definition which "does not talk in terms of accommodation at all" be interpreted so as to include ADA accommodations proposed by the employer?

Both the Ninth Circuit and the Seventh Circuit have noted that Saffle never asserted an ADA claim and that, therefore, there were no actual accommodations offered to her. On that additional basis, the Seventh Circuit attempts to distinguish *Saffle*. Thus the essential thrust of the Seventh Circuit's opinion must be that *because Ross asserted his rights* under the ADA, those efforts may be held against him on his disability claim. On the other hand, had Ross, like Saffle, stood silent and not attempted to invoke his rights under the ADA, there would presumably be no proposed accommodations to apply against him, and he would have received his benefits. Thus the Seventh Circuit's opinion sends a pernicious but clear message to disabled employees who

make efforts to return to work, as did Mr. Ross: you do so at your own peril.

Furthermore, the Seventh Circuit's decision in this case refusing to follow *Saffle* reflects an abandonment of the principle enunciated by a unanimous Court in *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 131 L. Ed. 2d 94, 115 S. Ct. 1223 (1995). In *Curtiss-Wright*, this Court stressed that it was a core purpose of ERISA that the provisions of the plan would be immediately ascertainable to a beneficiary. Indeed, this Court observed that the respondents in *Curtiss-Wright* were

> no doubt right that one of ERISA's central goals is to enable plan beneficiaries to learn their rights and obligations at any time. But ERISA already *has* an elaborate scheme in place for enabling beneficiaries to learn their rights and obligations at any time, a scheme that is built around reliance on the face of written plan documents.
>
> The basis of that scheme is another of ERISA's core functional requirements, that "[e]very employee benefit plan shall be established and maintained *pursuant to a written instrument.*" In the words of the key congressional report, "[a] written plan is to be required in order that every employee may, *on examining the plan documents*, determine exactly what his rights and obligations are under the plan."

Id. at 83 (quoting 29 U.S.C. § 1102(a)(1) (emphasis added) and H.R. Rep. No. 93-1280, at 297 (1974) (emphasis added)). In this case, the Seventh Circuit has permitted the ISTA Trust to impose a new eligibility requirement which surely cannot be determined on the face of the

plan. This ruling essentially negates the plan amendment provisions in ERISA which this Court reviewed in *Curtiss-Wright*. The Seventh Circuit's decision not only contravenes the purpose of ERISA's requirement that the rights and obligations of the plan be contained in the written plan document but also conflicts with this Court's observation that "fairly serious events such as plan amendments should be recognized as such and given special consideration." *Id.* at 82. Here, the ISTA Trust, operating on an *ad hoc* basis, in effect amended the plan–at least for one beneficiary. But the failure to amend the plan in writing shields the Trustee's decision from the scrutiny it should otherwise receive and which ERISA specifically contemplates it *will* receive by the plan participants as a whole.

Although the Seventh Circuit briefly noted that in his appeal "Ross suggests that the ISTA Trust's argument constitutes an attempt to use the ADA as a sword to deny Mr. Ross his benefits," A-22, the circuit court never squarely addressed this argument, concluding instead that the Trustees' consideration of ADA accommodations was "reasonable," *see* A-26 to A-27. In fact, the Seventh Circuit ignored the very heart of Ross's argument: the ADA was not designed to force any disabled person into the workplace, and any ERISA plan interpretation which reaches such a result should be based on plain and specific plan language to such effect.

The ADA prohibits employers from discriminating against a "qualified individual with a disability because of the disability of such individual." 42 U.S.C. § 12112(a). Accommodations under the ADA are mandated where an employer becomes aware that an employee or a person

seeking employment has a disability. The ADA does not require disabled persons who are potentially "qualified" individuals to seek employment. For a variety of very legitimate reasons, some persons who are disabled may reasonably choose *not* to be accommodated.

Just as importantly, plan beneficiaries should be placed on notice that if they attempt to exercise their rights under the ADA, their ERISA welfare benefit plan may capitalize on their efforts in order to raise a barrier to their receipt of benefits. The decision of the court of appeals here (permitting the ISTA Trust to read the ADA into the plan), in addition to impacting all workers who attempt to assert their rights under the ADA and ERISA, currently leaves thousands of Indiana teachers in the dark as to what their ERISA plan actually means. This result is directly contrary to the teaching of *Curtiss-Wright* as to one of the central goals of ERISA: "that every employee may, *on examining the plan documents*, determine exactly what his rights and obligations are under the plan." *Curtiss-Wright*, 514 U.S. at 83 (quoting H.R. Rep. No. 93-1280, at 297).

It follows that the petition should also be granted as to the second question presented. This Court should address the Seventh Circuit's erroneous decision in *Ross* not only to vindicate the principles enunciated in *Curtiss-Wright*, but also to resolve the conflict between it and the Ninth Circuit's decision in *Saffle*. This conflict, at least a conflict in principle, is not narrowly confined to the parties involved and is likely to impact *any* person who attempts to assert rights under both ERISA and the ADA. Specifically, this Court should address to what extent an ERISA fiduciary may consider ADA accommodations in

determining eligibility for the receipt of disability benefits, where the written ERISA plan is completely silent on the subject.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 2, 1998

APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

No. 97-3153

MARVIN O. ROSS,

Plaintiff-Appellee,

v.

INDIANA STATE TEACHER'S ASSOCIATION
INSURANCE TRUST,

Defendant-Appellant.

Nos. 97-3263

MARVIN O. ROSS,

Plaintiff-Appellant,

v.

INDIANA STATE TEACHER'S ASSOCIATION
and INDIANA STATE TEACHER'S ASSOCIATION
INSURANCE TRUST,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Indiana, Fort Wayne Division.
No. 95 C 245 – **Allen Sharp**, *Judge.*

ARGUED FEBRUARY 20, 1998 – DECIDED SEPTEMBER 3, 1998

Before BAUER, RIPPLE and ROVNER, *Circuit Judges*.

RIPPLE, *Circuit Judge*. Marvin O. Ross filed this action in the district court on July 27, 1995, against the Indiana State Teacher's Association ("ISTA") and the Indiana State Teacher's Insurance Trust (the "Trust"). In his complaint, he alleged a claim against the Trust under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001-1461, claims against both defendants under the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101-12213, and several pendent state law claims against both defendants.[1] On February 7, 1997, the district court granted summary judgment in favor of ISTA on Mr. Ross' ADA claim and dismissed the remaining state law claims against ISTA without prejudice under 28 U.S.C. § 1367(c). *See Ross v. Indiana State Teacher's Ass'n*, 955 F. Supp. 1025, 1030-32 (N.D. Ind. 1997). In addition, the district court granted the Trust's motion for partial summary judgment with respect to the ERISA claim. *See id.* at 1028-30. In April 1997, the case proceeded to trial on the only remaining claim–the ERISA claim against the Trust. Following a bench trial, the district court found in favor of Mr. Ross on that claim.

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[1] On September 9, 1996, ISTA moved for summary judgment on all claims brought against it; on the same day, the Trust moved for summary judgment on the ADA claim and the pendent state law claims and moved for partial summary judgment on the ERISA claim, seeking to establish that the abuse of discretion standard applied to that claim. In response, Mr. Ross conceded summary judgment on his ADA and state law claims against the Trust, leaving only the ERISA claim against the Trust, but otherwise opposed the defendants' summary judgment motions.

In this appeal, the Trust seeks reversal of the district court's judgment in favor of Mr. Ross on his ERISA claim. Mr. Ross cross-appeals from the district court's grant of summary judgment in favor of ISTA on his ADA claim. For the reasons set forth in the following opinion, we reverse the district court's judgment in favor of Ross on the ERISA claim and remand for further proceedings; we affirm the grant of summary judgment in favor of ISTA on the ADA claim.

I

BACKGROUND

A. Facts

1.

Marvin Ross worked for the Indiana State Teacher's Association from 1971[2] until his termination in December 1994 as the UniServ Director for Fort Wayne, Indiana. ISTA is a labor organization that represents teachers throughout the State of Indiana. As an ISTA UniServ Director, Mr. Ross was responsible for representing the Fort Wayne Education Association and its teacher members by providing advice and consultation to them with respect to matters including collective bargaining, grievance processing, unfair labor practices, organizing, program development and other employment-related

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[2] The parties state in their briefs that Mr. Ross' employment began with ISTA in 1971. However, Mr. Ross actually began his employment as the Executive Director of the Fort Wayne Education Association in 1971; the association merged with ISTA in 1972.

matters. Mr. Ross' position required that he visit various schools in his territory and that he attend a number of community events and meetings, including teacher meetings, collective bargaining meetings and school board meetings.

Mr. Ross has suffered from a degenerative hip condition since 1958. That condition has caused him to undergo numerous surgeries, including full hip replacements. In fact, he had undergone five surgical procedures prior to his employment with ISTA in 1971, and he had five additional surgeries during his tenure with ISTA. ISTA was aware of Mr. Ross' medical problems at the time it hired him, and it accommodated him throughout his 23-year employment with ISTA.[3]

In September 1992, Mr. Ross visited the Mayo Clinic and was examined by Dr. Miguel Cabanela. Dr. Cabanela wrote a report concluding that Mr. Ross' condition was such that he could not "function effectively at his work" and therefore that he "should be taken off work on an indefinite basis." R.87, Ex.12. Moreover, Dr. Cabanela expressed his opinion that Mr. Ross' condition was "permanent." As a result of this recommendation, Mr. Ross went on indefinite sick leave.[4] Because he indicated that

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[3] ISTA notes that it permitted Ross to modify his school building visitation schedule when necessary and that it allowed him time off for his numerous surgeries and therapy sessions.

[4] In December 1992, while on sick leave, Mr. Ross applied for Social Security disability benefits. The request for benefits was denied; however, Mr. Ross requested reconsideration of that decision and the Social Security Administration decided in July 1993 that he was entitled to benefits retroactive to March 1993.

his condition was permanent, ISTA posted a vacancy in the UniServ Director position in Fort Wayne. However, Mr. Ross expressed his desire to return to his position after further surgery, and ISTA agreed to delay filling the position until Mr. Ross received a post-operative prognosis from his doctor.

In February 1993, Dr. Cabanela performed another total hip replacement surgery on Mr. Ross. On March 29, 1993, Mr. Ross completed the 180-day waiting period required to be eligible to receive long-term disability benefits under the disability policy administered by the Trust.[5] Mr. Ross had applied for long-term disability benefits under the policy, and he began receiving them after the waiting period. The parties do not dispute that he was "totally disabled" within the meaning of the policy at that time. The policy defines the term "total disability":

> "Total Disability" (or Totally Disabled) for the first sixty (60) months of disability means that the Participant is disabled and unable to perform the substantial duties of the Participant's employment. . . .

R.87, Ex.6.

On May 14, 1993, Dr. Cabanela wrote that Mr. Ross was recuperating satisfactorily but that it was "unpredictable when and if he will be able to return to work." R.87, Ex.16. Because the UniServ Director spot had been left open since September 1992, ISTA wrote Mr. Ross and

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[5] The Trust is a nonprofit corporation governed by a Board of Trustees. The corporation was established to provide various fringe benefit plans primarily for the employees of Indiana school corporations and their dependents.

explained that the position could not be left vacant any longer unless ISTA could be assured that he would return by September 1, 1993. Mr. Ross did not respond to this letter, and ISTA hired a new director for Fort Wayne.

On September 15, 1993, Mr. Ross applied for additional disability benefits from the Indiana State Teacher's Retirement Fund, and he began receiving those benefits in October 1993. Therefore, Mr. Ross at that time was receiving Social Security disability benefits, long-term disability benefits from the Trust[6] and benefits from the Retirement Fund.

2.

In February 1994, the Trust's third-party administrator, the Huttleston Benefit Group ("Huttleston"), requested that Dr. Cabanela complete a questionnaire to determine whether Mr. Ross remained "totally disabled" under the Trust's disability plan. Although Dr. Cabanela's response indicated that Mr. Ross was still "totally disabled," he also indicated that Mr. Ross could perform sedentary work if it did not require excessive walking or use of stairs. This mixed response led Huttleston to question further whether Mr. Ross was still entitled to receive

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[6] Before Mr. Ross began receiving the long-term disability benefits from the Trust, he had received his full salary pursuant to the sick leave terms of the collective bargaining agreement negotiated between ISTA and the Indiana State Teacher's Association Professional Staff Organization ("PSO"), the union representing ISTA staff members. Once he began receiving the long-term disability benefits from the Trust, he was reduced to 66 2/3% of his regular salary.

long-term disability benefits from the Trust. Consequently, Huttleston contacted Bruce Rogers, the CEO and Director of the Trust, to determine whether an independent medical examination ("IME") of Mr. Ross should be obtained to ascertain whether he remained "totally disabled." Rogers replied that he believed it likely that Mr. Ross would be returning to work and therefore suggested that Huttleston defer seeking an IME until Mr. Ross had additional time to recuperate.

By July 1994, Mr. Ross had not returned to work and Huttleston again requested permission from Rogers to obtain an IME; at that time, Rogers agreed to request an IME. The examination was conducted by Dr. Michael Keating, a physician at the Center for Hip and Knee Surgery in Mooresville, Indiana. Dr. Keating concluded that Mr. Ross was capable of working if he was not required to move very often, lift objects or climb stairs, and if he could use a cane full time. Dr. Keating noted that the hip "actually looks outstanding" and that Mr. Ross would be capable of doing "some type of work" in keeping with the restrictions Dr. Keating set forth. R.87, Ex.72. After this report, Huttleston requested subsequent clarification from Dr. Keating. In response, Dr. Keating suggested that Mr. Ross would be able to return to work if he could use a wheelchair to prevent him from getting up and down too often.

After considering Dr. Cabanela and Dr. Keating's reports and the job requirements of a UniServ Director, a three-person committee at Huttleston determined that Mr. Ross was no longer "totally disabled" under the terms of the Trust policy because he was able to perform the substantial duties of his employment. Accordingly,

Huttleston advised Rogers that it believed Mr. Ross' benefits should be terminated. Rogers, though authorized to overturn that decision, did not disagree. Consequently, Huttleston sent Mr. Ross a letter on October 11, 1994, indicating that his long-term disability benefits would be terminated as of October 31, 1994.[7]

On October 17, 1994, Mr. Ross' PSO[8] representative, Donald Thompson, contacted ISTA and stated that Mr. Ross was ready to return to work. ISTA responded that it had a vacant UniServ Director position in its Shelbyville, Indiana office. ISTA also inquired when Mr. Ross would be able to start work and what accommodations would be necessary. On October 28, 1994, Thompson sent a letter reporting that Mr. Ross was available to return to work as of November 1, 1994. Attached with the letter was a list of suggested accommodations required of ISTA. Thompson made it clear in forwarding those suggested accommodations that "[t]he wording is Mr. Ross' and not that of PSO." R.87, Ex.23. This list of 19 accommodations was broad in scope. It included such requests as "[m]eetings with teachers shall be held in the UniServ Office" and accommodation "by insuring that I never have to move quickly, such as to avoid a running student." *Id.* Mr. Ross points out that Warren Williams, Executive Director of ISTA, was angered by the suggested accommodations.

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[7] This decision was affirmed by Huttleston following submission of additional materials from Mr. Ross in December 1994, and Mr. Ross sought administrative review of that affirmance. The pertinent details of the administrative appeal are set forth in the text.

[8] *See supra* note 6.

Williams testified that the requests were unreasonable and that Mr. Ross knew that some of them could not have been met. Doubting that the list was "recommended by any medical professional(s) or anyone other than Mr. Ross," ISTA requested on November 1, 1994, that Mr. Ross provide a statement from his physician regarding the "medical restrictions on his ability to work." R.87, Ex.24.

On November 3, 1994, Thompson wrote to ISTA stating that Mr. Ross would be asked to obtain a letter from his physician indicating that he "is able to return to work," and that "[w]e can continue to work on identification of needed accommodations from that point forward."[9] R.87, Ex.25. ISTA, on November 9, 1994, in light of Thompson's statement that Mr. Ross would be obtaining the letter from his physician, sent Mr. Ross a letter instructing him to report to work on November 28, 1994, at the Shelbyville office. ISTA further stated in that letter that it would "make those reasonable accommodations which are required under the Americans With Disabilities Act so that you can continue your career of employment with ISTA." R.87, Ex.27. However, ISTA warned Mr. Ross that "[f]ailure to report to work as indicated will be taken as a resignation indicating your intention to not return to work for ISTA." *Id.*

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[9] In this letter, Thompson also requested that ISTA clarify what the "essential functions" of the UniServ Director were. ISTA responded to that request and stated that all of the functions listed in the job description are essential functions. We note that the 15 responsibilities in that description are stated in general terms and do not clarify, for example, the extent to which Mr. Ross would have to travel, climb stairs, etc.

On November 10, 1994, Mr. Ross' physician, Dr. Phillip Johnson, sent a letter to ISTA concerning the accommodations required for Mr. Ross to return to work. In that letter, Dr. Johnson stated that it was his "opinion that Mr. Ross should not return to work, but it would require **ALL** the above accomodations [sic] if he were to return." R.87, Ex.29 (emphasis in original). ISTA responded to the requested accommodations in a letter dated November 18, 1994, indicating that it was willing to provide the majority of the requested accommodations. ISTA addressed each accommodation requested and indicated that it would, inter alia, agree to limit the use of stairs by scheduling meetings on the first floor of buildings where meetings were necessary, allow Mr. Ross to wear athletic shoes to provide sure footing, provide a parking space close to the office for his exclusive use, allow adjustment of Mr. Ross' work schedule to accommodate medical appointments, make alterations to the restroom in the Shelbyville office to provide for a person with disabilities, ensure that the doorways in the office were wide enough for wheelchair access, and make adjustments to the level of Mr. Ross' desk, computer table and work table to accommodate work from a wheelchair. However, ISTA stated that it was unable to schedule all meetings with teachers at the Shelbyville office. Moreover, ISTA stated that, in its view, certain of the accommodations requested were within Mr. Ross' control and that it could not assist him with respect to those matters. For example, Dr. Johnson's letter states that "[Mr. Ross] must be protected against having to engage in sudden movement, as such movement could cause severe damage to his hip if he should dislocate it or fall." R.87, Ex.29. ISTA's response

was, "It seems to us that is Mr. Ross's responsibility in that only he would know when he must engage in such movements." R.87, Ex.30. Mr. Ross notes that ISTA never actually undertook to make the Shelbyville office wheelchair-accessible by widening the doors or providing the alterations to the restroom.

Before Mr. Ross received ISTA's response to Dr. Johnson's list of accommodations, Mr. Ross wrote a letter responding to ISTA's instruction that he was to report to work on November 28, 1994. Mr. Ross explained that he would return to work at that time, but stated that "it was not I that suggested that I was physically ready (my doctor has not released me) to return to work." R.87, Ex.29.

Upon receiving this letter from Mr. Ross, ISTA concluded that Mr. Ross was not, in fact, released to work. Therefore, ISTA informed him on November 23, 1994, that he should not report to work until he could provide a letter from his doctor indicating that he was able to return without posing a threat of harm to himself; ISTA stated that if such a letter was not forthcoming by December 2, 1994, he would be terminated.[10]

The penultimate salvo in this barrage of correspondence was fired by Mr. Ross' attorney on November 29,

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[10] Meanwhile, on November 22, 1994, Mr. Ross wrote to ISTA noting that ISTA had agreed to some of his requested accommodations. However, because they were "widely divided" over certain of the accommodations, Mr. Ross recommended that the parties (Ross, ISTA management, and PSO reps) hold a meeting to discuss further his accommodations.

1994. That letter complained that Mr. Ross was in an awkward position because the Trust maintained that he was able to return to work and therefore had terminated his benefits. At the same time, according to Mr. Ross, ISTA would not provide him the necessary accommodations in accord with his doctor's requests and had threatened to terminate him if he failed to meet its "impossible deadline." The attorney further wrote:

> Neither Mr. Ross nor any of his physicians have suggested that he is able to return to work except under the very restricted circumstances set forth by Mr. Ross' personal physician Phillip J. Johnson, M.D.
>
> It was and is Mr. Ross' personal opinion that ISTA cannot provide him with employment within the strict guidelines set forth by Dr. Johnson and your November 23, 1994 letter confirms this. . . .
>
> . . . .
>
> On behalf of Mr. Ross, I can only reasonably conclude that you are agreeing that Mr. Ross continues to be disabled – that is, incapable of safely performing the ordinary duties of his job.

R.87, Ex.36. Finally, when Mr. Ross failed to produce a release from his physician, ISTA informed him on December 4, 1994, that he was terminated.

3.

Unsuccessful in his efforts to return to work for ISTA, Mr. Ross pressed forward in his endeavor to overturn the Trust's decision to terminate his long-term disability benefits. The hearing on Mr. Ross' administrative appeal was

held on February 3, 1995. That hearing was conducted by the Trust's Board of Trustees. Because three of the Trustees were also officers of ISTA, they recused themselves from the proceedings. Consequently, the hearing was attended by a quorum of five Trustees.

At the hearing, the Trustees reviewed Mr. Ross' claim and they asked questions of him, including how he spends an average day. In that regard, Rogers, one of the Trustees in the quorum, presented a videotape of Mr. Ross during a recent visit to his daughter's house in Florida. Rogers had commissioned a private investigator to film Mr. Ross to determine the extent of his actual disabilities. Mr. Ross notes that never, in the ten-year history of the Trust, had such a video been played at an administrative hearing. The tape showed Mr. Ross slowly walking into and out of a grocery store, then slowly, one bag at a time, carrying groceries into his daughter's home. *See* R.90 at 6. Subsequently, the Trustees heard from the Associate Executive Director for Field Services at ISTA regarding the duties of a UniServ Director and the accommodations that had been offered to Ross to enable him to return to his position at ISTA.

On February 21, 1995, Rogers, as CEO and Director of the Trust, sent Ross a letter informing him that the Trustees had decided to affirm Huttleston's termination of his disability benefits. The letter stated that the "Trustees made their decision in the context of the requirements of your professional position as UniServ Director, the restrictions placed upon you by your doctors and the accommodations offered by your employer as required by the [ADA]." R.87, Ex.47. Mr. Ross subsequently filed suit against ISTA and the Trust in July 1995.

B. Proceedings in the District Court

Mr. Ross brought ADA claims and pendent state law claims against both the Trust and ISTA; he also brought an ERISA claim against the Trust. However, he dropped his ADA claims and pendent state claims against the Trust, and pressed those claims only against ISTA. The district court, after considering summary judgment motions from ISTA and the Trust, granted summary judgment in favor of ISTA on the ADA claim and dismissed the remaining state claims without prejudice. The district court concluded that there was no genuine issue of material fact with respect to whether Mr. Ross was a "qualified individual with a disability," and concluded that he was not such an individual because he was not capable of performing the essential functions of his job. *See Ross*, 955 F.Supp. at 1032. The district court based this decision on the ground that, because Mr. Ross maintained throughout the litigation that he was totally disabled and was entitled to long-term disability benefits under the Trust's policy, he could not "simultaneously argue that he is capable of performing the essential functions of his job." *Id.*

Only Mr. Ross' ERISA claim against the Trust survived the summary judgment phase of the litigation. After a two-day bench trial on that issue, the district court determined that the Trustees had abused their discretion in denying Mr. Ross' long-term disability benefits on the ground that he was not totally disabled within the meaning of the disability policy. Specifically, the court found that it was an abuse of discretion for the Trustees to consider the accommodations offered by ISTA to Mr. Ross in the course of deciding whether Mr. Ross was

unable to perform his "substantial duties" within the meaning of the policy. In the district court's view, such a consideration was inconsistent with the plain and unambiguous language of the policy and therefore the Trustees had abused their discretion in denying Mr. Ross' benefits. The district court explained that Mr. Ross was unable to perform his substantial duties without accommodation and that, aecordingly, he was entitled to long-term disability benefits.

II

DISCUSSION

On appeal there are two main claims which we must address. The first is the claim of the Trust, opposed by Mr. Ross, that the district court erred in concluding that the Trustees abused their discretion in considering the accommodations offered by ISTA in their determination regarding Mr. Ross' entitlement to disability benefits. The second is the claim of Mr. Ross, opposed by ISTA, that the district court erred in granting summary judgment in favor of ISTA on Mr. Ross' ADA claim. We shall address these issues in turn.

A. ERISA Claim

The Trust challenges the district court's judgment that the Trustees abused their discretion in considering the reasonable accommodations offered by ISTA in the process of determining whether Mr. Ross was totally

disabled under the disability policy. We review the district court's determination of this question of law de novo.

1.

As an initial matter, we address the parties' dispute regarding the standard of review that governs this inquiry. The Trust suggests, in its brief to this court, that the Board's decision should be reviewed under the arbitrary and capricious standard. In contrast, Mr. Ross claims that the abuse of discretion standard applies.

We have explained on prior occasions that the Supreme Court, in *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101 (1989), established that, "in interpreting benefits under an ERISA plan, a de novo standard of review is appropriate unless the plan documents give 'the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan.' " *Cozzie v. Metropolitan Life Ins. Co.*, 140 F.3d 1104, 1107 (7th Cir. 1998) (quoting *Firestone Tire*, 489 U.S. at 115). The long-term disability plan at issue here clearly imparts discretionary authority to the plan administrator to interpret the terms of the plan. The plan provides in relevant part:

> The Plan Administrator shall have the right to interpret the terms and provisions of the Benefit Plan and to determine any and all questions arising under the Benefit Plan or in connection with the administration of the Benefit Plan,

> including, without limitation, the right to remedy or resolve possible ambiguities, inconsistencies, or omissions, by general rule or particular decision.

R.87, Ex.6. When the administrator is given discretion to interpret the terms of the plan, the "extent of the deference given the administrator 'determines the extent of judicial deference.' " *Cozzie*, 140 F.3d at 1107 (quoting *Morton v. Smith*, 91 F.3d 867, 870 (7th Cir. 1996)). This is the case because *Firestone Tire* "did not establish a single standard for reviewing the discretionary decisionmaking of plan fiduciaries" but instead "presented a 'smorgasbord of possibilities' for standards of review." *Morton*, 91 F.3d at 870.

In *Morton*, this court differentiated between the arbitrary and capricious standard of review and the abuse of discretion standard. We stated that when plan administrators are constrained to make "reasonable" interpretations of a plan, "their decisions are reviewed according to the familiar abuse-of-discretion standard." *Id.* In contrast, we explained, when the administrators need only "interpret the plan under the broad standard of good faith, their discretion is even more extensive, and judicial review is even more deferential." *Id.* In that case, the arbitrary and capricious standard applies.

The distinction between these standards is indeed nebulous; in fact, we have (both before and since our decision in *Morton*) treated these standards of review, in this context, as substantially equivalent. *See Gallo v. Amoco Corp.*, 102 F.3d 918, 921 (7th Cir. 1996) (stating that issue to be determined was whether "Amoco had abused its discretion, or, what amounts to the same thing, had

acted arbitrarily and capriciously"), *cert. denied*, 117 S. Ct. 2532 (1997); *Lister v. Stark*, 942 F.2d 1183, 1188 (7th Cir. 1991) (observing that, after the Supreme Court's decision in *Firestone Tire*, some circuits used the arbitrary and capricious standard, some used the abuse of discretion standard and one court had found them to be interchangeable, and stating that we "are sympathetic to [the] unwillingness to split semantic hairs");[11] *see also Chambers v. Family Health Plan Corp.*, 100 F.3d 818, 825 n.1 (10th Cir. 1996) (noting distinction drawn in *Morton*, but stating that "[m]ost courts, however, have held that this is a 'distinction without a difference' " (quoting *Cox v. Mid-America Dairymen, Inc.*, 965 F.2d 569, 572 n.3 (8th Cir. 1992))).

Whatever the value of such a distinction between the standards of review may be, we conclude in this case that we need not determine whether such a distinction is viable. The Trust, in response to Mr. Ross' submission that it has attempted, for the first time in this appeal, to obtain review under the arbitrary and capricious standard, states in its reply brief that what it has argued is "that the proper ERISA standard of review is the heightened, deferential ERISA standard of judicial review" which is known "both as the 'abuse of discretion' standard and the 'arbitrary and capricious' standard." Trust's

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[11] It is interesting to note that in *Lister*, the parties' stances were juxtaposed with those presented here. In that case, the party seeking the standard of review more deferential to the administrator asserted that the abuse of discretion standard, not the arbitrary and capricious standard, was appropriate. *See id.* at 1187.

Reply Br. at 2. Moreover, in the Trust's view, "there simply is no practical difference between the abuse of discretion standard and the arbitrary and capricious standard." *Id.* Because the Trust perceives no distinction between the standards, we review the Board's decision to deny Mr. Ross' benefits under an abuse of discretion standard–which Mr. Ross asserts is the appropriate one and which the district court concluded was the correct standard.

In determining whether the Board of Trustees abused its discretion in denying Mr. Ross' benefits, we must determine not whether its decision is correct or whether we would have answered the question another way, but instead whether the Board's interpretation of the plan was unreasonable.[12] *See Mers v. Marriott Int'l Group Accidental Death & Dismemberment Plan*, 144 F.3d 1014, 1021 (7th Cir. 1998) (stating that, under the arbitrary and capricious standard, "it is not our function to decide whether we would reach the same conclusion as the Plan or even rely on the same authority" and that we shall also "not set aside a plan's denial of benefits if the denial was based on a reasonable interpretation of the plan documents"), *petition for cert. filed*, 67 U.S.L.W. 3106 (U.S. July

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[12] Mr. Ross also argues that our review of the Board of Trustees' decision to deny his benefits should be of the more "searching" judicial inquiry variety applied in cases in which a conflict of interest or bias has been shown. *See Ladd v. ITT Corp.*, No. 974138, 1998 WL 334382, at * 1 (7th Cir. June 22, 1998) (stating that when the "administrator has a conflict of interest . . . though the standard of review is nominally the same, the judicial inquiry is more searching"). Upon review of the record, we believe, as did the district court, that the claims of personal bias are speculative.

31, 1998) (No. 98-209); *cf. Ladd v. ITT Corp.*, No. 97-4138, 1998 WL 334382, at *1 (7th Cir. June 22, 1998) ("Since the [ERISA] plan authorized the plan administrator to use its discretion in making claims determinations, our role is the limited one of determining whether [the defendant] abused its discretion–acted unreasonably–or, as the cases say (but all these are different ways of saying the same thing), exercised its discretion in an 'arbitrary and capricious' manner." (citing cases)).

2.

The district court ruled in favor of Mr. Ross on his ERISA claim; it determined that the Board of Trustees abused its discretion because it effectively defined the "unable to perform the substantial duties" language of the policy to include the words "with or without reasonable accommodation." R.90 at 7. The court found that the plain language of the plan did not include any reference to accommodations and therefore that the Board was unreasonable in construing the plan terms in that manner.

The Trust makes several arguments attacking the merits of the district court's decision.[13] In essence, the

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[13] The Trust claims that the issue Mr. Ross pursued at trial was that the Board abused its discretion in denying him benefits because Rogers was biased against him personally and that his bias infected the Board's decision to deny Mr. Ross' benefits. The Trust states that the question of the Board's consideration of ISTA's accommodations for Mr. Ross was not raised until the post-trial briefing stage of the litigation. In addition, because the district court ordered that the parties file their post-trial submissions simultaneously, the Trust maintains that it was not

Trust asserts that the plan language is silent with respect to whether accommodations available to a person should be considered in determining whether a person is "totally disabled" under the plan. Recall that the definition of that term states only that a plan participant is totally disabled if he is "disabled and unable to perform the substantial duties of the Participant's employment." When a plan is silent about such an aspect of the plan's administration, the Trust submits, it is within the power of interpretation given to the Board to determine whether the accommodations offered an employee should be considered in ascertaining whether he is unable to perform the substantial duties of his employment.

In support of this proposition, the Trust relies upon *Gallo v. Amoco Corp.*, 102 F.3d 918 (7th Cir. 1996). In that case, the plan terms were silent with respect to the appropriate calculation method to be used in determining annual retirement benefits. Although the plan administrator there applied different interpretations of the same term in the plan, *see id.* at 922, the court upheld the administrator's interpretation of the plan. The court stated "[w]hen as in this case the plan document does not furnish the answer to the question, the answer given by the plan administrator, when the plan vests him with discretion to interpret it, will ordinarily bind the court." *Id.* The Trust maintains that this principle applies here; it

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able to respond to this issue. Therefore, claims the Trust, this point was waived and was an inappropriate ground of decision for the district court to find that the Board had abused its discretion. Given the circumstances presented in this record, we do not think the matter waived.

reasonably interpreted the plan to permit consideration of the accommodations actually offered Mr. Ross in the process of ascertaining whether he was no longer able to perform the substantial duties of his employment.

The Trust also asserts that, as a practical matter, this interpretation of the plan is sensible in light of the ADA's requirements. The Trust notes that the ADA requires employers to make reasonable accommodations for disabled employees; in this case, ISTA agreed to make certain accommodations. It was reasonable, therefore, for the Trust to consider whether Mr. Ross was unable to perform the substantial duties of his employment in light of those accommodations that ISTA had agreed to make.

In response, Mr. Ross claims that the Board's interpretation of the plan language was not an interpretation at all but instead was effectively a rewriting of the plan to add a requirement that cannot be found in the plain language of the definition of "totally disabled." Mr. Ross relies primarily on the plan language for this argument, noting that the language is devoid of any reference to the ADA or an employer's ability or willingness to accommodate the plan participant in performing his substantial duties. Mr. Ross suggests that the Trust's argument constitutes an attempt to use the ADA as a sword to deny Mr. Ross his benefits, when in actuality it is a shield designed to protect those with disabilities.

Moreover, Mr. Ross relies on *Saffle v. Sierra Pacific Power Co. Bargaining Unit Long Term Disability Income Plan*, 85 F.3d 455 (9th Cir. 1996). He construes this case as establishing the principle that an employer's reasonable

accommodations cannot be taken into account in determining whether a person is disabled. In *Saffle*, according to Mr. Ross, the Ninth Circuit found that the plan administrator abused its discretion in interpreting the disability provision at issue to allow consideration of the accommodations the employer could make in determining whether the participant was totally disabled. *See id.* at 459-60. Mr. Ross urges that we should find similarly.

Because this issue is a matter of interpretation of an ERISA plan, we look to federal common law principles of contract interpretation to guide our inquiry. *See Santaella v. Metropolitan Life Ins. Co.*, 123 F.3d 456, 461 (7th Cir. 1997). Under those rules, it is generally the case that we "interpret the terms of the policy in an ordinary and popular sense, as would a person of average intelligence and experience." *Id.* (internal quotations omitted). However, as we recently explained, "while the starting point in resolving an issue of interpretation of an ERISA . . . plan is the general law of contracts, the ending point may be different if the general law doesn't fit the issue because of something either in ERISA or in the nature of a pension plan." *Mathews v. Sears Pension Plan*, 144 F.3d 461, 466 (7th Cir. 1998) (contrasting general contract rules with ERISA-specific rules). In that vein, we note that, although, generally, ambiguities in an insurance policy are construed in favor of an insured, in the ERISA context in which a plan administrator has been empowered to interpret the terms of the plan, this rule does not obtain. *See Morton v. Smith*, 91 F.3d 867, 871 n.1 (7th Cir. 1996) (explaining that rule of contra proferentem applies only when courts undertake de novo review of an

administrator's interpretation of an ERISA plan). Therefore, if we find that a term of the plan is ambiguous, it need not be construed in favor of Mr. Ross.

3.

We believe that the district court erred in concluding that the Board of Trustees abused its discretion by considering the actual accommodations offered by ISTA in determining whether Mr. Ross was unable to perform the substantial duties of his job. We agree with Mr. Ross that the plan is silent with respect to whether such accommodations may be considered. We believe, however, that the Board acted well within its discretion when it interpreted the plan to allow it to consider the accommodations to which ISTA agreed. The Board's job was to determine whether Mr. Ross was "unable to perform the substantial duties of [his] employment." In so doing, the Board expressly considered a number of factors, including "the requirements of your professional position as UniServ Director, the restrictions placed upon you by your doctors and the accommodations offered by your employer as required by the Americans with Disabilities Act." R.87, Ex.47. We think that this approach was reasonable in light of the plan language.

We think it worth noting that the Board considered the accommodations that ISTA actually agreed to make. The Board did not simply determine that, as a theoretical matter, there were some possible accommodations or other work available which might accommodate Mr.

Ross. The Board's judgment was not based on hypothetical grounds but rooted explicitly in the precise accommodations agreed to by ISTA. In this context, we do not think that the Board of Trustees effectively modified or rewrote the terms of the plan; instead, it adopted a rational interpretation of the broad language of the plan. "When . . . the plan document does not furnish the answer to the question, the answer given by the plan administrator, when the plan vests him with discretion to interpret it, will ordinarily bind the court. That is implicit in the idea of deferential review of the plan administrator's interpretation." *Gallo*, 102 F.3d at 922. The question raised here–whether the Board could consider the accommodations offered by ISTA for Mr. Ross–was not answered by the terms of the plan. We cannot say that it was unreasonable for the Board to have considered those accommodations in its effort to determine whether Mr. Ross was able to perform the substantial duties of his job.

We also do not think the decision in *Saffle* requires a different result. In *Saffle*, the interpretation of a total disability provision was also at issue. Saffle was a customer services clerk and her job was described by her employer as mostly sedentary; she was seated at least 80% of the time. *Saffle*, 85 F.3d at 457. Saffle applied for disability benefits after suffering complications from surgery on her foot. The plan language in that case provided that a person is "totally disabled" when "he is completely unable to perform each and every duty of his regular occupation." *Saffle*, 85 F.3d at 457. In the course of determining that Saffle was not totally disabled under that

definition, the administrator construed the disability definition to mean " 'the inability to perform substantial portions of the employee's regular job.' " *Id.* Because work was available for which she was qualified that would have enabled her to work with her feet elevated, most examining physicians determined that Saffle was not totally disabled; accordingly, the administrator stated that " 'the weight of the medical opinion is that you could perform a substantial portion of your regular job with the accommodations that could have been made.' " *Id.* at 457-58. The Ninth Circuit found that the administrator abused its discretion by defining Saffle's "regular occupation" in a manner inconsistent with the plain language of the plan. Specifically, the court held that construing that term as allowing consideration of *other* work for which she was qualified (but that she was not previously performing) merged impermissibly the occupational and general disability aspects of the plan. *See id.* at 459. Therefore, the court ultimately concluded that the administrator "arbitrarily construed the Plan to include performing a substantial portion of 'work available for which she is qualified' with accommodations that could have been made." *Id.* at 460.

Saffle does not suggest that it is inappropriate to consider accommodations actually offered to an employee to determine whether he is able to perform the substantial duties of his regular job. The problem in *Saffle* with the accommodations that were considered was that they were essentially outside of the realm of Saffle's regular job and therefore were at odds with the policy language at issue. Moreover, the accommodations in that case do not appear to have been actually offered to Saffle;

the employer simply stated, in seeking doctor's evaluations regarding her ability to work, that there was work available which would allow her to accommodate her disability.

We therefore hold that, under the plan language at issue here and in light of the Board's discretion to interpret the terms of the plan, it was not an abuse of discretion for the Board of Trustees to consider the actual accommodations offered Mr. Ross by ISTA in determining whether he remained totally disabled under the plan. Accordingly, the district court's judgment in favor of Mr. Ross on the ERISA claim is reversed.

4.

The district court noted that, in addition to the issue we have discussed, there remained the issue as to whether the Board's use of the videotape at Mr. Ross' hearing and the alleged lack of notice to Mr. Ross that the videotape would be shown, rendered the decision of the Board arbitrary and capricious. Because the district court determined that the Trustees' use of reasonable accommodations standards rendered their decision infirm, an issue on which we now have expressed our respectful disagreement, the court explicitly reserved ruling on the manner in which the videotape was used. Accordingly, we must now remand the case to the district court for further consideration.

B. ADA Claim

We turn next to Mr. Ross' challenge to the district court's grant of summary judgment in favor of ISTA on his ADA claim. We review de novo a district court's grant of summary judgment. *See Talanda v. KFC Nat'l Management Co.*, 140 F.3d 1090, 1095 (7th Cir. 1998), *petition for cert. filed*, 67 U.S.L.W. 3093 (U.S. July 2, 1998) (No. 98-37). Summary judgment is appropriate when the record reveals no genuine issue of material fact and the moving party, ISTA, is entitled to a judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). In order for Mr. Ross to avoid summary judgment on his claim, he must "supply evidence sufficient to allow a jury to render a verdict in his favor." *Nowak v. St. Rita High School*, 142 F.3d 999, 1002 (7th Cir. 1998) (internal quotations omitted). Presenting only a "scintilla" of evidence or mere conclusory allegations will not enable Mr. Ross to prevail. *See id.* (citing cases). In conducting our review, we construe the facts of record in the light most favorable to the nonmoving party, Mr. Ross. *See Talanda*, 140 F.3d at 1095. Moreover, in employment discrimination cases, where credibility and intent are crucial issues, we review the record with heightened scrutiny. *See Vanasco v. National-Louis Univ.*, 137 F.3d 962, 964-65 (7th Cir. 1998).

1.

Mr. Ross brought a claim against ISTA under the ADA. The ADA prohibits employers from discriminating against a "qualified individual with a disability because of the disability of such individual." 42 U.S.C. § 12112(a).

Such discrimination includes an employer's failure to make reasonable accommodations to the "known physical or mental limitations of an otherwise qualified individual with a disability who is an . . . employee, unless such [employer] can demonstrate that the accommodation would impose an undue hardship on the operation of the business." 42 U.S.C. § 12112(b)(5)(A). In order to succeed in an ADA claim, the plaintiff bears the burden of establishing that he is a "qualified individual with a disability." *See McCreary v. Libbey-Owens-Ford Co.*, 132 F.3d 1159, 1164 (7th Cir. 1997). The ADA defines a "qualified individual with a disability" as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8). The determination regarding whether an individual is such a qualified individual must be made "as of the time of the employment decision." *See Nowak*, 142 F.3d at 1003. There is no dispute here that Mr. Ross is disabled. Instead, the dispute focuses, in part, on whether Mr. Ross is a "qualified individual."

There are two prongs to the "qualified individual" definition. First, the disabled individual must satisfy "the requisite skill, experience, education and other job-related requirements of the employment position [he] holds or desires." 29 C.F.R. § 1630.2(m). In light of Mr. Ross' 20+ year term of employment as a UniServ Director for ISTA, there is no dispute between the parties that he possesses the requisite skill and experience necessary to do the job. Second, the person must establish that he "can perform the essential functions of such position" with or

without accommodation. *Id.* This aspect of the definition of "qualified individual" is in dispute.

Mr. Ross asserts that the evidence of record establishes that he was capable, with accommodation, of performing the essential functions of his position, or that at least there is a genuine issue of fact in this regard. In his view, moreover, ISTA broke off the requisite interactive process prematurely and thus failed to provide the reasonable accommodations that he needed in order to return to work. In contrast, ISTA maintains that it fully cooperated with Mr. Ross in an interactive process to determine what reasonable accommodations were necessary in order to enable him to return to work, but Mr. Ross made it clear that he was unable and unwilling to return on a basis that would enable him to perform the essential functions of his job. Therefore, in ISTA's view, Mr. Ross is not a "qualified individual with a disability" because he was unable to perform the essential functions of his job even with reasonable accommodations.

2.

We examine first the interactive process that occurred here to determine whether ISTA may be liable under the ADA for its breakdown. In *Beck v. University of Wisconsin Board of Regents*, 75 F.3d 1130, 1137 (7th Cir. 1996), we explained the ADA's requirements with respect to the interactive process:

> Once an employer knows of an employee's disability and the employee has requested reasonable accommodations, the ADA and its

> implementing regulations require that the parties engage in an interactive process to determine what precise accommodations are necessary. . . . Liability for failure to provide reasonable accommodations ensues only where the employer bears responsibility for the breakdown [in the process]. But where . . . the employer does not obstruct the process, but instead makes reasonable efforts both to communicate with the employee and provide accommodations based on the information it possessed, ADA liability simply does not follow.

Id. In this case, an interactive process clearly took place. In fact, the record reflects that ISTA had been aware of Mr. Ross' disability from the time of his hiring and that it had been in the practice of accommodating him by enabling him to work around his surgeries and his disability. For example, in this case, although Mr. Ross informed ISTA as of September 1992 that he was away from work indefinitely, it agreed to keep his position open for almost a year to see if he would be able to return to work.

Once the Trust informed Mr. Ross in October 1994 that his disability benefits would be terminated, he contacted ISTA expressing an interest in returning to work. ISTA at this point itself initiated the process of trying to accommodate Mr. Ross by explaining that it had a Uni-Serv Director position open for him and by asking what accommodations Mr. Ross needed in order to return to work. Mr. Ross responded through his union representative with a list of accommodations; ISTA in turn believed that all of these accommodations were not medically necessary and asked Mr. Ross to obtain a statement from

his physician regarding the medical restrictions on his ability to work. Prior to receiving that report, ISTA indicated to Mr. Ross that he should report to work on November 28, 1994. Mr. Ross then provided, by a letter dated November 10, Dr. Johnson's report and list of accommodations. ISTA responded to that list and agreed to the majority of the requested accommodations.[14]

Before Mr. Johnson [*sic*] received ISTA's response to his requested accommodations, he had received the letter indicating he was to report to work on November 28. He responded to that letter with one explaining that it was not his idea to return to work and that he had not been released by his doctor. Upon receiving this letter from Mr. Ross, ISTA sent another letter requiring him to obtain a release to return to work and, failing that, stating that he should not report. Mr. Ross believed this request was unreasonable because the only way he could obtain such a release was if ISTA agreed to all of his requested accommodations. ISTA, in turn, had already indicated that it was not willing to do that. In an attempt to avoid the deadline imposed on him to provide the medical release, Mr. Ross asked for a meeting to discuss the accommodations further. However, ISTA did not respond to this request. Finally, his attorney wrote to ISTA and made clear that Mr. Ross could not return to work and acknowledged that ISTA could not meet all of Mr. Ross' demands. ISTA's demand for a medical release was not met by the

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[14] *See supra* pp. 8-9.

time it had set to receive one–December 2, 1994–and Mr. Ross was terminated.[15]

On this record, we do not think that a reasonable trier of fact could determine that ISTA bore the responsibility for the breakdown; it cannot be said that ISTA failed to engage in the informal interactive process required of it. *See* 29 C.F.R. § 1630.2(o)(3); *Beck*, 75 F.3d at 1136 (stating that "failure to provide the information may be the cause of the breakdown and the party withholding the information may be found to have obstructed the process"). ISTA had received strong indications that Mr. Ross was not ready to return to work, despite his originally stated intent to return as of November 1, 1994. Dr. Johnson's letter of November 10, 1994, containing the list of accommodations, indicated that he was reluctant to allow Mr. Ross to return at all. In that letter, Dr. Johnson stated, "I do not believe that it would be in Mr. Ross' benefit to return to any work" and that it "is still my opinion that Mr. Ross should not return to work, but it would require **ALL** the above accomodations [sic] if he were to return." R.87, Ex.29. In addition, after ISTA had responded, and acquiesced, to most of the demanded accommodations, it received from Mr. Ross the letter stating "it was not I that suggested that I was physically ready (my doctor has not released me) to return to work." *Id.* Finally, his attorney confirmed that he was still not physically able to meet the requirements of ISTA and that ISTA could not meet all of his demands for accommodation. Given these circumstances, it was reasonable for

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[15] ISTA points out that Mr. Ross did not attempt to obtain such a release until after December 3.

ISTA to want a medical release prior to allowing Mr. Ross to return to work.

3.

We also find unavailing Mr. Ross' arguments to the effect that he was capable of returning to work with reasonable accommodation but ISTA refused to provide the necessary accommodations for him. In support of his contention, Mr. Ross cites various statements made by ISTA representatives, his doctor and himself to the effect that he is capable of performing his job with reasonable accommodation. For example, Mr. Ross notes that ISTA's Assistant Executive Director testified at the Trust's administrative hearing regarding his disability benefits that Mr. Ross would be capable of returning to work with the accommodations ISTA agreed to provide him. Moreover, Mr. Ross' physician, Dr. Johnson, concluded that he could perform the essential functions of his job if he were reasonably accommodated.[16] Mr. Ross himself also has

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[16] Mr. Ross relies on an affidavit obtained from Dr. Johnson in preparation for his summary judgment motion. In that affidavit, Dr. Johnson states that "I do believe that with appropriate reasonable accommodations on the part of ISTA Mr. Ross would have been able to return to work at ISTA, subject to my monitoring of his condition." R.50, Ex.I. However, as ISTA points out, this statement, made in support of a litigation position, stands in fairly stark contrast to the statements in Dr. Johnson's letter to ISTA indicating that he did not believe that Mr. Ross should return to work at all and only if all accommodations were provided. Even in Dr. Johnson's affidavit, he reiterates that "[h]ad all of the[ ] suggested accommodations been agreed to by Mr. Ross's employer, I would have been able to release him to return to work." *Id.* As

testified as to his own belief that he could have returned to work.

However, as ISTA points out, Mr. Ross' argument and evidence here fall short of establishing his ability to perform the essential functions of his job with accommodation. The problem with Mr. Ross' argument is that he assumes away the thorny issue–the reasonable accommodations to be made that would enable him to perform the essential functions of his job. The statements by ISTA officials were made with the understanding that Mr. Ross would accept the accommodations to which ISTA agreed. However, at no time did Mr. Ross demonstrate that he was willing to return to work on those grounds. Indeed, he and his physician maintained that he could only return to work if all of his proposed accommodations were agreed to. We do not think that Mr. Ross, while denying his ability to return except with **all** of his requested accommodations, can rely on the statements of others expressing their opinions that he could have returned to work with fewer than all of those accommodations.

Notably, Mr. Ross has acknowledged that a substantial portion of the essential job duties of a UniServ Director involves time spent outside of the office in meetings at various locations.[17] Nevertheless, one of his demanded

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we explain, we do not think this testimony sufficient to demonstrate that Mr. Ross was able to perform the essential functions of his job with reasonable accommodations.

[17] In his application for Social Security benefits, Mr. Ross explained that he averaged three meetings per day outside of the UniServ Director office in "Ft. Wayne schools (54 total in

accommodations was that all teacher meetings be scheduled in the Shelbyville ISTA office. ISTA would not agree to such a demand. The essential job duties of a UniServ Director clearly involve meetings outside of the Director's office. Moreover, ISTA had established a school visitation program that was part of the Director's job function. There would be little point in having such a school visitation program for UniServ Directors if all of the teachers were required instead to meet the Director at his office. Given Mr. Ross' position that all of his requested accommodations were medically necessary and that at least one of those requests–that all meetings be held at his office–was clearly unreasonable, he has not demonstrated that he was willing or able to perform the essential functions of his job with reasonable accommodation. Accordingly, we conclude that the district court properly determined that Mr. Ross is not a "qualified individual with a disability." Mr. Ross has maintained, throughout this litigation, that he was totally disabled, unable to return to work and therefore entitled to long-term disability benefits. Given his consistent position that he is totally disabled, taken together with the evidence regarding his requested accommodations, it appears clear to us that Mr. Ross has not established a genuine issue of fact regarding whether he was able to

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FW), the FWES administrative center, or other community facilities such as the Chamber of Commerce." R.87, Ex.51. Moreover, Dr. Keating, the physician who conducted the IME, wrote in his report that Mr. Ross described his job as requiring him "to visit 55 schools within the Fort Wayne Community School District and that he only spends 35-40% of his time in his office." R.87, Ex.72.

perform the essential functions of his position with reasonable accommodation. Consequently, we affirm the district court's decision to grant summary judgment to ISTA on the ADA claim on this ground.

Conclusion

The Trust in this case, through its Board of Trustees, reasonably considered the accommodations actually offered by ISTA in determining whether Mr. Ross was totally disabled within the meaning of the policy. Therefore, we reverse the district court's judgment in favor of Mr. Ross holding that the Trust abused its discretion in interpreting the policy in that manner and in denying Mr. Ross his disability benefits. The case is remanded for consideration of the remaining issue.

In addition, we conclude that Mr. Ross and ISTA engaged in an interactive process to reach a reasonable accommodation that would enable Mr. Ross to return to work. That process broke down when Mr. Ross failed to provide the requested release from his physician. Mr. Ross has not otherwise established that ISTA violated the ADA because he did not demonstrate that he could perform the essential functions of his job with reasonable accommodation. Consequently, we affirm the district court's grant of summary judgment to ISTA on Mr. Ross' ADA claim. ISTA may recover its costs on this appeal. The other parties shall bear their own costs.

REVERSED and REMANDED in part;
AFFIRMED in part

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

MARVIN O. ROSS, Plaintiff, v. INDIANA STATE TEACHER'S ASSOCIATION and INDIANA STATE TEACHER'S ASSOCIATION INSURANCE TRUST, Defendants.	)	No. 1:95 cv 245 AS

MEMORANDUM AND ORDER

I. Procedural History

Plaintiff Marvin O. Ross ("Ross") filed this action against the Indiana State Teacher's Association ("ISTA") and the Indiana State Teacher's Association Insurance Trust ("Trust") on July 27, 1995, alleging violations of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §12101 *et seq.* and the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §1001 *et seq.*, as well as several pendent state law claims. ISTA filed a motion for summary judgment on September 9, 1996, on all claims pending against it. The same day, the Trust filed a motion for summary judgment on the ADA claim against it, a motion for summary judgment on the pendent state law claims against it, and a motion for partial summary judgment on the ERISA claim against it. On October 9,

1996, Ross responded to the various motions, and conceded the motions for summary judgment filed by the Trust on the ADA and state law claim issues. On October 18, 1996, the Trust filed a reply to Ross's response, and on October 24, 1996, ISTA did likewise. On November 5, 1996, oral argument was held on the pending motions in South Bend, Indiana before this judge. As the issues have been fully briefed, this court is now ready to rule.

As a preliminary matter, ISTA has filed a motion to strike Ross's affidavit, attached to his appendix of evidentiary materials as appendix J. That motion is now denied. However, this court will give the affidavit only the weight it deserves, bearing in mind that one cannot by affidavit "effectively oppose a motion for summary judgment by contradicting his own deposition testimony." *Cherry v. American Tel. & Tel. Co.*, 47 F.3d 225, 232 (7th Cir. 1995). Furthermore, to the extent that the affidavit characterizes the contents of letters already admitted into evidence, this court will rely on the letters, and not Ross's characterization thereof.

II. Facts

Marvin O. Ross was hired by the Fort Wayne Education Association ("FWEA") in 1971 as its executive director. When the FWEA merged with the ISTA in 1972, Ross became an employee of the ISTA as the Uni-Serv Director for the Fort Wayne area, where he served until the events of this complaint. In 1958, Ross suffered an injury to his hip-thigh area, which caused him to walk with a cane, and required him to have several surgeries, both before and during his employment with ISTA.

In September, 1992, Ross traveled to the Mayo Clinic in Rochester, Minnesota, at which time his doctors there placed him on indefinite sick leave from his employment. In March, 1993, Ross qualified for, and began receiving, long term disability ("LTD") benefits from the Trust, and in July, 1993, Ross began receiving Social Security disability payments. In 1994, the Trust's third party administrator of the benefit plan, the Huttleston Group, requested that Ross submit to an independent medical examination ("IME") to show that he continued to be totally disabled. After the IME, a three person panel at the Huttleston Group determined that Ross was not totally disabled and that his LTD benefits should be discontinued. The LTD benefits were discontinued as of October 31, 1994. Ross appealed that decision to the Board of Trustees of the Trust, which affirmed the Huttleston Group's decision in February 1995. The discontinuation of benefits forms Ross's ERISA claim.

During October, 1994, before his LTD benefits were discontinued on October 31, 1994, Ross made inquiries to ISTA through his own union, the Professional Staff Organization ("PSO"), about returning to work. The ISTA had previously filled his position in Ft. Wayne in September, 1993, after Ross was unable to return to it at that time. However, the ISTA offered Ross a position as UniServ Director in its Shelbyville, Indiana, office, and asked Ross what accommodations would be needed for Ross to assume the position. On October 28, 1994, the PSO representative sent a letter to ISTA with Ross's suggested accommodations. ISTA sent a response to the PSO representative on November 1, 1994, requesting that Ross have his doctor provide "a comprehensive statement of the

medical restrictions on his ability to work." To the extent the accommodations requested by Ross in the October 28 letter were not recommended by his physician, the ISTA requested that Ross explain why such accommodations were necessary and reasonable. The PSO representative sent the ISTA a letter on November 3, 1994, stating that they would have Ross's doctor provide a statement, and requesting that the ISTA define the essential functions of Ross's job, for purposes of determining what accommodations were required. On November 9, the ISTA responded that all duties listed in the job description of a UniServ Director were essential functions. The November 9 letter further stated that ISTA would make necessary and reasonable accommodations at the Shelbyville office and would expect Ross to begin at the Shelbyville office on November 28, 1994. If Ross did not begin work in Shelbyville on November 28, ISTA would consider such as a notice of resignation and would terminate the employment relationship. The same day, ISTA sent a letter to Ross, informing him that he had been assigned to the Shelbyville office, where he was to start on November 28, that ISTA would make all reasonable accommodations, and that if he did not start on November 28, ISTA would take that as a resignation.

On November 10, Dr. Philip Johnson, Ross's personal physician, sent a letter to ISTA which stated that he did not believe that Ross should return to work, but which listed 16 accommodations, all of which would be required for Ross to return to work without placing him at risk of injury. On November 18, 1994, ISTA responded to Dr. Johnson's list of accommodations to the PSO representative, stating that ISTA could accommodate Ross in 15 of

the requested areas, but could not assure Ross that all meetings would be held in the UniServ office. On November 21, ISTA received a letter from Ross, dated November 16, 1994, in which Ross stated he would report to the Shelbyville office on November 28, 1994 "as I have no intention of being insubordinate. I trust ISTA management will have the necessary accommodations arranged for the [Shelbyville] office so that there will [*sic*] no risk of further harm or injury to me." Ross went on to state that his own doctor had not released him to work; rather, the independent doctor hired by the Trust had concluded Ross was ready to work. On November 23, 1994, ISTA wrote a letter to the PSO representative regarding the letters from Dr. Johnson and Ross. In that letter, ISTA questioned Ross's desire to return to work, based on the "no intention of being insubordinate language," and suggested that ISTA had been misled by the PSO's representations that Ross was able to return to work. ISTA informed the PSO that Ross was *not* to report to Shelbyville until he presented a letter from his physician releasing him to work. Further, unless Ross provided such a letter, as he was no longer on long-term disability leave, his employment would be terminated as of December 5, 1994. Although Ross had sent a letter to ISTA dated November 22, 1994, responding to ISTA's letter regarding accommodation, that letter was apparently not received by ISTA until after the November 23 letter was sent, and no further efforts were made by ISTA to accommodate Ross at the Shelbyville office.

Ross did not provide ISTA with a physician's release, nor did he attempt to obtain one prior to ISTA's deadline. Rather, Ross's attorney sent a letter to ISTA threatening

the present action if ISTA did not continue to pay Ross benefits during the pendency of his appeal with the Trust. ISTA responded by terminating Ross's employment on December 4, 1994, when Ross failed to provide the requested physician's release.

III. Analysis

A. Summary Judgment Standard

Summary judgment is proper if the pleadings, depositions, answers to interrogatories and admissions on file, together with any affidavits, show that there exists no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56; *Russo v. Health, Welfare & Pension Fund, Local 705*, 984 F.2d 762 (7th Cir. 1993). A thorough discussion of Rule 56 can be found in a trilogy of cases decided in 1986 by the Supreme Court of the United States. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). *Celotex* addressed the initial burdens of the parties under Rule 56, and *Anderson* addressed the standards under which the record is to be analyzed within the structure of Rule 56.

The initial burden is on the moving party to demonstrate, "with or without supporting affidavits," the absence of a genuine issue of material fact and that judgment as a matter of law should be granted in the moving party's favor. *Celotex*, 477 U.S. at 324 (quoting Fed.R.Civ.P. 56). A question of material fact is a question which will be outcome determinative of an issue in the

case. The Supreme Court has instructed that the facts material in a specific case shall be determined by the substantive law controlling the given case or issue. *Anderson*, 477 U.S. at 248. Once the moving party has met the initial burden, the opposing party must "go beyond the pleadings" and "designate 'specific facts shows that there is a genuine [material] issue for trial.' " *Id.* The nonmoving party cannot rest on its pleadings, *Waldridge v. American Hoechst Corp.*, 24 F.3d 918, 920-21 (7th Cir. 1994); *Hughes v. Joliet Correctional Ctr.*, 931 F.2d 425, 428 (7th Cir. 1991), nor may that party rely upon conclusory allegations in affidavits. *Cusson-Cobb v. O'Lessker*, 953 F.2d 1079, 1081 (7th Cir. 1992).

During its summary judgment analysis, the court must construe the facts and draw all reasonable inferences in the light most favorable to the nonmoving party. *Smith v. Fruin*, 28 F.3d 646, 650 (7th Cir. 1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 735 (1995); *Brennan v. Daley*, 929 F.2d 346, 348 (7th Cir. 1991). Furthermore, it is required to analyze summary judgment motions under the standard of proof relevant to the case or issue. *Anderson*, 477 U.S. at 252-55.

The 1986 Supreme Court trilogy was later reexamined in *Eastman Kodak v. Image Technical Servs.*, 504 U.S. 451 (1992), a case born in the context of antitrust law. The most that can be said for *Eastman Kodak*, however, is that it did not tinker with *Celotex* and *Anderson*, and possibly involves an attempt to clarify *Matsushita*. This view is well-supported by an in-depth academic analysis in Schwarzer, Hirsch, and Barrans, *The Analysis and Decision of Summary Judgment Motions*, 139 F.R.D. 441 (1992).

B. ERISA Claim

The Trust has moved for partial summary judgment on Ross's ERISA claim to have the court determine what the appropriate standard of review will be for the Trust's determination. The Trust is an Indiana not-for-profit corporation established to provide various benefit plans to employees of Indiana school corporations and their dependents, including the LTD plan provided to ISTA employees. The Trustees of the Trust are the designated "Plan Administrator," but the plan allows the Trustees to appoint delegates to "perform certain administrative duties under the Benefit Plan." *ISTA Insurance Trust Disability Income Benefits Benefit Plan Booklet*, ¶11.01. The plan provides the following definition for "Powers of Plan Administrator":

> The Plan Administrator (including its delegates) shall have all such powers as may be necessary to carry out the provisions of the Benefit Plan and may, from time to time, establish rules for the administration of the Benefit Plan and the transaction of the Benefit Plan's business. In making any such determination or rule, the Plan Administrator shall pursue uniform policies established from time to time. The Plan Administrator shall have the right to make any finding of fact necessary or appropriate for any purpose under the Benefit Plan including but not limited to the determination of eligibility for and the amount of any Benefit payable. The Plan Administrator shall have the right to interpret the terms and provisions of the Benefit Plan and to determine any and all questions arising under the Benefit Plan or in connection with the administration of the Benefit Plan, including,

> without limitation, the right to remedy or resolve possible ambiguities, inconsistencies, or omissions, by general rule or particular decision. To the extent permitted by law, all findings of fact, determinations, interpretations, and decisions of the Plan Administrator shall be conclusive and binding upon all persons having or claiming to have any interest or right under the Benefit Plan.

ISTA Insurance Trust Disability Income Benefits Benefit Plan Booklet, ¶11.02. The Trust has delegated certain administrative duties to The Huttleston Group, a third party administrator.

In *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), the Supreme Court was faced with the question of appropriate standard of review for trustee decisions challenged under 29 U.S.C. §1132(a)(1)(B). The *Firestone* Court determined that a *de novo* standard of review was appropriate except in cases where the fiduciary had been granted broad discretionary powers, in which case an arbitrary and capricious or abuse of discretion standard was to be used. 489 U.S. at 115. The Trust here argues that the language quoted above, and specifically the phrase "shall have all such powers as may be necessary to carry out the provisions of the Benefit Plan," is sufficient to show that the Trustees as plan administrators have been granted discretion such that their decision should be reviewed under an arbitrary and capricious standard. Ross responds that the Trust has failed to consider the language quoted above that "in making any such determination or rule, the Plan Administrator shall pursue uniform policies established from time to time." Ross

argues that the Trustees' failure to institute uniform policies vitiates the discretion granted them. The Trust replies that because the administrator "may, from time to time, establish rules" and "shall pursue uniform policies" in "making any such . . . rules," there is no mandate to create the policies, and thus the failure to create policies does not impinge on the trustees' discretion.

While the Plan is not a model of clarity, it is clear to this court that the drafters' intent was to grant the Trustees the broadest possible discretion. Not only does the Plan grant the administrator "all such powers as may be necessary to carry out the provisions of the Benefit Plan," it also provides the administrator the "right to make any finding of fact necessary or appropriate for any purpose under the Benefit Plan including but not limited to the determination of eligibility" and "the right to interpret the terms and provisions of the Benefit Plan." In *Krawczyk v. Harnischfeger Corp.*, 41 F.3d 276 (7th Cir. 1994), the Seventh Circuit held that a plan which granted the plan committee, which was the plan administrator, "such powers as may be necessary to discharge its duties hereunder, including, but not by way of limitation, the following powers and duties: (a) to construe and interpret the Plan, decide all questions of eligibility and determine the amount, manner and time of payment of any benefits hereunder . . . " vested the plan committee with discretion such that the court reviewed the plan committee's decision under an abuse of discretion standard. 41 F.3d at 278. Although Ross attempts to distinguish *Krawczyk* because it lacks the "uniform policies" language, he has failed to produce any case to support his argument. Further, despite Ross's argument to the contrary, the plan

language does not "den[y] the trustee the power to act except pursuant to 'uniform policies'," Ross Memorandum in Opposition, p.8, n.3. Rather, the plan requires the plan administrator to act in a uniform manner when making determinations or rules. When paragraph 11.02 of the plan is taken as a whole, it is clear that the administrator is given broad discretion, and that the plan's requirement of uniformity does not require that rules be written before that discretion can be exercised.

Ross then argues that because a conflict of interest exists in the person of Bruce Rogers, Director of the Trust and a manager in ISTA, the *de novo* standard should be utilized. However, the Supreme Court in *Firestone* laid rest to that argument.

> Thus, for purposes of actions under §1132(a)(1)(B), the de novo standard of review applies regardless of whether the plan at issue is funded or unfunded and regardless of whether the administrator or fiduciary is operating under a possible or actual conflict of interest. Of course, if a benefit plan gives discretion to an administrator or fiduciary who is operating under a conflict of interest, that conflict must be weighed as a "facto[r] in determining whether there is an abuse of discretion." Restatement (Second) of Trusts §187, Comment *d* (1959).

Firestone, 489 U.S. at 115. Although the Supreme Court does not differentiate between economic and personal conflicts of interest, it appears that the Court's reasoning would apply to either situation. Thus, Ross's conflict of interest argument is not persuasive. Certainly, evidence of personal animus aimed at Ross will be considered in determining whether an abuse of discretion occurred, but

the Trust's decision will be weighed for an abuse of discretion, not under a *de novo* standard. Thus, the Trust's motion for partial summary judgment on the standard of review is granted.

C. ADA Claims

The general rule regarding employment discrimination under the ADA is found at 42 U.S.C. §12112(a), which states as follows:

> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

"Qualified individual with a disability" is defined in 42 U.S.C. §12111(8) as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires," and the regulations promulgated by the Department of Labor to interpret the ADA further explain that the qualified individual with a disability is one who has the requisite skill, experience, education and other job-related requirements and who can, with or without reasonable accommodation, perform the essential functions of such position. 29 C.F.R. §1630.2(m). ISTA concedes that Ross has a disability and that he has the requisite skill and experience to perform the job of UniServ Director. Thus the question is whether Ross was able to perform the essential functions of the position if provided with reasonable accommodation,

given that the essential functions of the position were those listed on the job description and performance expectations list provided as Ross's deposition exhibit 13.

In *Vande Zande v. State of Wis. Dep't. of Admin.*, 44 F.3d 538 (7th Cir. 1995), Chief Judge Posner wrote that "reasonable' may be intended to qualify (in the sense of weaken) 'accommodation,' in just the same way that if one requires a 'reasonable effort' of someone this means less than the maximum possible effort . . . " and that accommodation meant that "[t]he employer must be willing to consider making changes in its ordinary work rules, facilities, terms and conditions in order to enable a disabled individual to work." 44 F.3d at 542, 543. Following that lead, Judge Cummings wrote in *Beck v. University of Wis. Bd. of Regents*, 75 F.3d 1130 (7th Cir. 1996) that both parties have a responsibility to engage in an interactive process to determine what reasonable accommodations are necessary to enable the employee to work. Recognizing that the failure of the interactive process is often the cause of litigation, the *Beck* court went on to hold that "courts should attempt to isolate the cause of the breakdown [of the interactive process] and then assign responsibility." 75 F.3d at 1135. "Liability for failure to provide reasonable accommodations ensues only where the employer bears responsibility for the breakdown." *Id.* at 1137. In *Bultemeyer v. Fort Wayne Community Schools*, 100 F.3d 281 (7th Cir. 1996), the Seventh Circuit reversed Magistrate Cosbey's order granting summary judgment for the employer, finding that a material issue of fact existed as to whether the school had engaged in the interactive process in good faith. The *Bultemeyer* court held that the "employer has to meet the employee half-

way, and if it appears that employee may need an accommodation but doesn't know how to ask for it, the employer should do what it can to help." 100 F.3d at 1285.

In this case, it is clear that both parties engaged in the interactive process. When Ross inquired about returning to work through the PSO representative, ISTA responded by inquiring into what accommodations Ross would need to return. Ross provided a list of accommodations both personally and from his physician. ISTA responded to the physician's list and agreed to do most of the items on the list. However, ISTA stated that "[w]e cannot schedule all meetings within the UniServ unit to be held at the UniServ office." Although the tone of ISTA's letters up to this point had not been entirely welcoming, the interactive process was working. After this point, though, the breakdown began. Ross's November 16 letter stated he would report, but that he had not been released to work. This caused the ISTA to require Ross to provide a doctor's release, which he did not provide. Meanwhile, Ross's reply to the ISTA's response on reasonable accommodations suggested a meeting to resolve the differences, but did not suggest any solutions to the remaining problem. It appears that while Ross wanted to work, he knew he was not able to work, and once ISTA realized Ross was not able to work, they did not want him to work. Neither side is blameless in the breakdown, but this court would be hard pressed to say which side was more at fault. Unlike the school in *Bultemeyer*, ISTA did inquire about accommodations and make efforts to see how Ross could work again. Certainly ISTA's failure to have any of the physical facility accommodations made does not place it in a good light, but

ISTA ended its efforts to accommodate Ross when they received his letter stating he had not been released to work on Monday, November 21, after sending the accommodation response letter on Friday, November 18. However, this court need not decide where the interactive process broke down, because even if the parties had agreed to a reasonable accommodation, Ross would not have been able to perform the essential functions of the job because he was totally disabled during the relevant time period.

In *Bollenbacher v. Helena Chemical Co.*, 934 F.Supp. 1015 (N.D.Ind. 1996),[1] (now Chief) Judge Lee faced a situation very similar to this one. In that case, the plaintiff alleged that his rights under ERISA were violated when he was denied long term disability benefits and that his rights under the ADA were violated when his employment was terminated. 934 F.Supp. at 1020, 1026. Judge Lee held that because the plaintiff alleged that he was totally disabled in his application for disability benefits, he could not simultaneously argue that he was capable of performing the essential functions of his job such that he was a qualified individual with a disability under the ADA. *Id.* at 1026-27. Even though the plaintiff had continued to work at his position after applying for the disability benefits, the court in *Bollenbacher* held that he was not a qualified individual with a disability protected by the ADA when his employment was later terminated. *Id.*

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[1] *Bollenbacher v. Helena Chemical Co.*, 1:95cv350 WCL, was dismissed by stipulation of the remaining parties on September 24, 1996. No appeal has been filed, and the time for appeal has passed.

Judge Lee distinguished *Overton v. Reilly*, 977 F.2d 1190 (7th Cir. 1992), on the basis that the plaintiff in *Overton* had not alleged he was totally disabled when he applied for Social Security benefits, unlike the plaintiff in *Bollenbacher. Id.* Although Ross does not specifically allege that he is totally disabled in his complaint, he is only entitled to long term disability benefits if he is totally disabled, and he has alleged that his long-term disability benefits were wrongfully terminated. Beyond that minor difference, the facts in these cases are on all fours. Ross, like Bollenbacher, applied for long term disability benefits on the basis of his total disability (and Ross actually received the benefits.) Ross, like Bollenbacher, was later terminated from his employment. Bollenbacher was in the process of applying for Social Security disability benefits, which Ross has applied for and received. Neither Bollenbacher nor Ross has worked since being terminated from their prior employment. Although Ross's disability benefits were terminated because the Trust determined he was no longer totally disabled, Ross has consistently held the position that he was totally disabled and entitled to the benefits. He cannot simultaneously argue that he is capable of performing the essential functions of his job. Thus, no genuine issue of fact exists as to whether Ross was a qualified individual with a disability; he was not. ISTA's motion for summary judgment is therefore granted.

IV. Conclusion

ISTA's motion to strike, as stated above, is now **DENIED**. As Ross conceded the Trust's motions for summary judgment on the ADA and state law claims against it, those motions are now **GRANTED**. The Trust's motion

for partial summary judgment on the question of standard of review for the ERISA claim is also **GRANTED**. Finally, ISTA's motion for summary judgment is **GRANTED** on the ADA claim. Ross's pending state law claims against ISTA are **DISMISSED WITHOUT PREJUDICE** pursuant to 28 U.S.C. §1367(c) and he is given leave to re-file them in state court. The clerk is **ORDERED** to set this cause for pre-trial conference on the remaining issues.

IT IS SO ORDERED.

Dated: February 7, 1997

/s/ Allen Sharp
ALLEN SHARP, JUDGE
NORTHERN DISTRICT OF INDIANA

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

MARVIN O. ROSS, Plaintiff, v. INDIANA STATE TEACHERS ASSOCIATION, and INDIANA STATE TEACHERS ASSOCIATION INSURANCE TRUST, Defendants.	)	No. 1:95 cv 245 AS

I. Procedural History

Plaintiff Marvin O. Ross ("Ross") filed his complaint in this case against the Indiana State Teachers Association ("ISTA") and the Indiana State Teachers Association Insurance Trust ("Trust") on July 27, 1995, alleging violations of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §12101 *et seq.* and the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §1001 *et seq.*, as well as several pendent state law claims. On February 7, 1997, this court granted summary judgment in favor of the ISTA on the ADA claim against it and dismissed the state law claims against the ISTA without prejudice, granted summary judgment in favor of the Trust on the ADA claim against it, and granted the Trust's partial motion for summary judgment on the issue of standard of review on the ERISA count. *See Ross v. Indiana State Teacher's Ass'n*, 955 F.Supp. 1025 (N.D.Ind. 1997).

The remaining ERISA claim was tried to the court without a jury in two trial days, April 14 and 15, 1997. Since then, in accord with the instructions of the court at the end of that trial, able and experienced counsel have filed appropriate briefs in a form requested by the court on May 27, 1997 so that this court can here and now in this fashion comply with Rule 52, Federal Rules of Civil Procedure (Fed.R.Civ.P.).

To the extent that any finding of fact is subsequently deemed to be a conclusion of law, the court adopts it as such; to the extent that any conclusion of law is deemed to be a finding of fact, the court adopts it as such. *See Miller v. Fenton*, 474 U.S. 104, 113-14, 105 S.Ct. 445, 451-52 (1985).

II. Facts

Beginning in 1958, Marvin Ross has suffered a degenerative condition in his right hip which has necessitated several surgeries. In 1971, Ross was hired by the ISTA's predecessor organization in Fort Wayne, the Fort Wayne Education Association ("FWEA") as its executive director, and in 1972, when the FWEA merged with the ISTA, Ross became an ISTA employee as the UniServ Director for Fort Wayne, a position which he held until December, 1994. As an employee of the ISTA, Ross was entitled to a number of fringe benefits, including long term disability insurance through the ISTA Insurance Trust, an ERISA welfare benefit plan.

In September, 1992, after experiencing increasing pain in his right hip, Ross visited the Mayo Clinic and was examined by the surgeon who had done his most

recent hip surgery, Dr. Miguel Cabanela. Dr. Cabanela determined that Ross' hip was in such bad condition that Ross should be taken off work on an indefinite basis, and he opined that the condition might be permanent. In February, 1993, Dr. Cabanela performed a second total hip replacement surgery on Ross; shortly after returning home from Mayo, Ross experienced a dislocation of his hip and was forced to wear a full body cast for several months. Ross started using his sick leave through the ISTA as of September 29, 1992, and on March 29, 1993, he completed the 180 day waiting period before starting long term disability. Ross was granted long term disability benefits from the Trust in March, 1993; additionally, he was granted Social Security disability benefits in July, 1993.

Ross returned to Mayo for check-ups in August, 1993 and February, 1994. Around the time of Ross' visit in February, 1994, Dr. Cabanela received a questionnaire from the Huttleston Benefit Group ("Huttleston") the third party administrator of the Trust's long term disability plan. Dr. Cabanela reported that Ross was totally disabled, but that he could be able to do totally sedentary work if it did not require any walking or use of stairs. When Huttleston received this response, it questioned whether Ross was in fact totally disabled. Thus, a representative from Huttleston called Bruce Rogers ("Rogers"), Executive Director of the Trust, to ask if an independent medical examination ("IME") should be performed on Ross to determine if he was still disabled. At that time, in the spring of 1994, Rogers responded that he believed Ross would be returning to work and that Huttleston should wait. When Ross did not return to work by early

July, 1994, Huttleston again requested permission from Rogers to have an IME performed, and this time, Rogers consented. Huttleston contacted Crawford & Company, who selected Dr. E. Michael Keating, of the Center for Hip and Knee Surgery in Mooresville, Indiana, as the physician to perform the IME. Dr. Keating examined Ross on July 25, 1994, and determined that Ross could perform work if he did not have to move very often, lift objects or climb stairs, and could use a cane full time.

Huttleston requested clarification from Dr. Keating, and Dr. Keating sent two letters on September 20, 1994, both stating that Ross could return to work so long as he could use a wheelchair to prevent him from having to get up and down too frequently. After comparing the reports from Drs. Cabanela and Keating to the ISTA standard job description for a UniServ Director and Ross' performance expectations for 1992-93, the committee of three at Huttleston determined that Ross' benefits should be terminated as he was no longer so disabled that he could not perform the substantial duties of his employment. Huttleston then contacted Rogers again to inform him of the committee's decision. Although Rogers has testified that he had to [*sic*] power to reverse the committee's decision, he did not do so, and thus on October 11, 1994, Huttleston sent a letter to Ross informing him that his benefits would be terminated as of October 31, 1994.

Ross then made efforts to return to work at ISTA; however, those efforts were eventually unsuccessful and resulted in his termination from employment when he failed to produce a doctor's release to work under a timetable set out by the ISTA. As a part of that effort, Ross' personal physician, Dr. Phillip Johnson, prepared a

list of accommodations that would be required for Ross to return to work, and that list was later sent to Huttleston as a part of the appeals process. Dr. Johnson's letter did not persuade Huttleston or Rogers to reverse their decisions.

Originally, the Board of Trustees of the Trust was set to meet on January 6, 1995 to hear Ross' appeal; however, that date was continued because one of the teacher trustees would be unable to attend, and because the three ISTA officials who were trustees had recused themselves from the hearing due to Ross' termination, a quorum would not be present. Thus the meeting was re-scheduled for February 3, 1995. During the interim, Ross and his wife drove to Tampa, Florida to visit their daughter for a few days. Bruce Rogers had meanwhile been reviewing Huttleston's file in preparation for the appeal hearing, and he believed that Dr. Johnson's list of accommodations was inconsistent with the reports of Drs. Cabanela and Keating. He thus determined that he needed more information about Ross' true condition, and he hired a private investigator from Keenan and Associates to report on Ross' condition. Either Rogers or the investigator discovered that Ross would be traveling to Florida, and as the investigator had been unable to see much of Ross outdoors in January in Ft. Wayne, Rogers gave his approval for the investigator to follow Ross to Florida. While there, the investigator made a videotape of Ross' activities and then delivered the tape to Rogers as a part of his report.

Because of Ross' dispute with the ISTA, the Trust determined that it wanted legal counsel available for the appeal hearing, and thus the Trust retained Attorney

Richard Darko. Darko sent a letter to Ross' counsel, Wade Bosley, on December 20, 1994, informing him about the procedure for the hearing, and telling him that the hearing was intended to be a review of the information already provided to the Trust, not an opportunity to present new issues, although Ross would be allowed to speak to the Trustees if he so desired. Mr. Darko followed that with a second letter on December 22, 1994, stating that the three ISTA officials who served as Trustees had decided to recuse themselves. Darko's December 22 letter also informed Mr. Bosley that "the Administration of the Trust intends to present information in person" regarding the duties of a UniServ Director. At no time did Darko or anyone from the Trust inform Ross of the existence of the videotape prior to the appeal hearing.

On February 3, 1995, the Trustees, less the three who had recused themselves, met to hear Ross' appeal of the termination of his disability benefits.[1] Although there is conflicting testimony between the Trustees, apparently the Trustees do not receive copies of the claims information until immediately before the meeting, as the Trust considers that information to be confidential. Rogers and Maryanne Huttleston reviewed the claims information with the Trustees, and then Ross and his counsel were invited into the room. The Trustees asked Ross various

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[1] Apparently the Trust did not keep a record of the proceedings at this hearing. Ross attempted to make an audiotape of the proceedings, but said tape was not offered as evidence, and there is some discussion in the record that his tape was less than complete. This court is surprised that the Trust would find it necessary to retain counsel for this hearing, but not necessary to maintain a record of the hearing.

questions, including how Ross spent an average day. Rogers then announced that he had a videotape showing how Ross "really spends his days." The video, which this court has reviewed, shows Ross slowly walking into and out of a grocery store, then slowly, one bag at a time, carrying groceries into his daughter's home in Tampa, Florida. After the tape was played, Doyle McAllister, Associate Executive Director for Field Services at ISTA, was given the opportunity to speak to the Trustees about the duties of a UniServ Director. This court specifically credits Ross' testimony that McAllister responded to a question from the Trustees by answering that ISTA would do what was necessary to accommodate Ross to allow him to return to work. At no time during the hearing or during their deliberations were the Trustees informed that Ross' employment by ISTA had been terminated.

On February 21, 1995, Rogers, as Chief Executive Officer of the Trust, sent a letter to Ross informing him of the Trustees' decision affirming Huttleston's termination of Ross' benefits. The letter stated that "the Trustees made their decision in the context of the requirements of your professional position as UniServ Director, the restrictions placed upon you by your doctors and the accommodations offered by your employer as required by the Americans with Disabilities Act." The decision listed several accommodations that ISTA, through Doyle McAllister, had offered to provide, and specifically stated that the Trustees "believe that with ISTA's accommodations, you could perform the substantial duties of your employment." Thus, the Trustees denied Ross' appeal for benefits under the plan.

III. Analysis

There is no question that the disability benefit plan is an "employee welfare benefit plan" as that phrase is defined by 29 U.S.C. §1002, and this court has previously determined that it will review the Trustee's decision under an abuse of discretion standard as required by *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989). *See Ross v. Indiana State Teacher's Ass'n*, 955 F.Supp. 1025, 1029-30 (N.D.Ind. 1997). Thus the question presented is whether the Trustees' decision was an abuse of their discretion.

Section 1.08 of the *ISTA Insurance Trust Disability Income Benefits Benefit Plan Booklet* defines "total disability" as follows:

> "Total Disability" (or Totally Disabled) for the first sixty (60) months of disability means that the participant is disabled and unable to perform the substantial duties of the Participant's employment.

The Plan Booklet does not define the term "substantial duties"; however, section 11.02 of the Plan Booklet does provide that the "Plan Administrator shall have the right to interpret the terms and provisions of the Benefit Plan." Both Huttleston and the Trustees have interpreted the phrase "unable to perform the substantial duties" to include the words "with or without reasonable accommodation," and because they believed that Ross could perform the substantial duties of his employment with reasonable accommodation, his disability benefits were terminated. Ross argues that the Trustees' interpretation constitutes an abuse of discretion because it creates an

additional requirement not found in the plain language of the plan.

In *Swaback v. American Information Technologies Corp.*, 103 F.3d 535 (7th Cir. 1996), the Seventh Circuit held that "if fiduciaries or administrators of an ERISA plan controvert the plain meaning of a plan, their actions are arbitrary and capricious." 103 F.3d at 540. The Seventh Circuit, in *Wahlin v. Sears, Roebuck & Co.*, 78 F.3d 1232 (7th Cir. 1996), gave district courts guidance for understanding ERISA plans as follows:

> Resolving this dispute over the denial of benefits under an ERISA-governed plan requires us to apply the federal common law rules of contract interpretation. *Brewer v. Protexall Inc.*, 50 F.3d 453, 457 (7th Cir. 1995); *McNeilly v. Bankers United Life Assur. Co.*, 999 F.2d 1199, 1201 (7th Cir. 1993). "Those rules direct us to interpret ERISA plans in an ordinary and popular sense as would a person of average intelligence and experience. . . . " *Brewer*, 50 F.3d at 457 (quoting *Bullwinkel v. New England Mut. Life Ins. Co.*, 18 F.3d 429, 431 (7th Cir. 1994)). Additionally, "when plan terms are ambiguous, we construe them strictly in favor of the insured." *McNeilly*, 999 F.2d at 1201 (citing *Phillips v. Lincoln Nat. Life Ins. Co.*, 978 F.2d 302, 307 (7th Cir. 1992)). "A term is [only] ambiguous if it is subject to reasonable alternative interpretations." *Bechtold v. Physicians Health Plan*, 19 F.3d 322, 325 (7th Cir. 1994) (citing *Hickey v. A.E. Staley Mfg.*, 995 F.2d 1385, 1389 (7th Cir. 1993)).

The question is thus whether the Trustees' interpretation is one that a person of average intelligence and experience would understand the plan to say, and the answer is

clear. No average individual, upon reading the phrase "unable to perform the substantial duties of the Participant's employment," would immediately understand that to require that the Participant be unable to perform the substantial duties with or without reasonable accommodation. The reasonable accommodation requirement which the Trustees have construed is not part of the plain language of the plan, and no average individual would read it as such. Although the plan language is not ambiguous about this issue, if it were, the question would be resolved in favor of the insured, Ross. Thus, the Trustees, as plan administrator, have controverted the plain meaning of the plan, an arbitrary and capricious action.

This decision is on all fours with a decision from the Ninth Circuit, *Saffle v. Sierra Pacific Power Co.*, 85 F.3d 455 (9th Cir. 1996), in which the plan administrator read the phrase "completely unable to perform each and every duty of his regular occupation" to include "even with reasonable accommodation." The district court reversed the administrator's decision and the Ninth Circuit affirmed the district court, holding that the administrator's interpretation regarding accommodation was arbitrary and capricious. 85 F.3d at 459-60. It is clear to this court that Ross was unable to perform the substantial duties of his employment without accommodation, and possibly unable to perform those duties even with accommodation. Thus, he is entitled to have his benefits reinstated as of November 1, 1994.

The court must briefly address Ross' other arguments. The court notes that at the time of the bench trial, plaintiff proceeded on a theory that the Trustees' decision was arbitrary and capricious because a personal bias held

by Rogers against Ross had tainted the appeal proceeding or because some conspiracy between the ISTA and the Trust had influenced the proceeding.[2] Although this court specifically finds that plaintiff's testimony was credible, his beliefs as to the bias held by Rogers or an ISTA/Trust conspiracy were mere speculation. Rogers was available to testify, but was not called, and no evidence other than Ross' speculation was presented.[3] Thus, his theory is appropriately rejected.

Plaintiff has also argued that his claim was handled in a non-uniform manner because of the use of the videotape and because Huttleston requested several clarifications from Dr. Keating. Although this court does not find it overly unusual that a doctor would be asked for clarifications of his statement, the videotape and the manner in which it was presented to the Trustees certainly created an appearance of non-uniform treatment. Although the court finds that the videotape does not contradict the statements of the various doctors, the manner in which it

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[2] This court finds it striking that Doyle McAllister, a high-ranking official of ISTA, who had full knowledge of Ross' termination, appeared before the Trustees and stated that the ISTA was willing to provide the listed accommodations to Ross, but failed to inform the Trustees that Ross' employment had previously been terminated because of his failure to provide a release from his physician. Perhaps he was instructed not to mention Ross' termination, and this court has no way of knowing why the Trustees were not informed thereof, but McAllister's presentation to the Trustees was certainly less than candid.

[3] The oft-cited passage of Rogers' deposition does not, in this court's opinion, evince any bias against Ross. Rather, it is a crass-minded individual's expression regarding Ross' attorney.

was obtained and shown, and the fact that Ross was not notified of its existence prior to the hearing, may have rendered the hearing arbitrary and capricious, although the court need not reach that issue now.

IV. Conclusion

Because the Trustees' inclusion of a reasonable accommodation aspect to the plan definition of "Total Disability" was arbitrary and capricious, and because Ross was clearly disabled under the plain language of the plan, this court now reverses their decision and remands Ross' appeal to the Board of Trustees to determine what benefits are due to him from the time those benefits were wrongfully terminated on November 1, 1994. The clerk shall enter judgment in favor of Ross and against the Trust.

IT IS SO ORDERED.

Dated: July 28, 1997

/s/ Allen Sharp
ALLEN SHARP, JUDGE
NORTHERN DISTRICT
OF INDIANA

[Letterhead Names Omitted In Printing]

ISTA Insurance Trust
150 West Market Street, Suite 830
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(317) 263-3330
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February 21, 1995

Mr. Marvin O. Ross
7629 Sunderland Drive
Fort Wayne, IN 46835-1243

Dear Marvin:

The Trustees have asked me to inform you of their decision regarding your long term disability benefit appeal. In making a final determination, the Trustees reviewed the evidence in your file including the medical opinions of your doctors and Dr. Michael Keating who performed the independent medical exam, the information provided by you and your representatives at the hearing, the testimony of your employer and all other related data.

BACKGROUND

The ISTA Insurance Trust Benefit Plan states:

1.08 – Total Disability (or Totally Disabled) for the first sixty (60) months of disability means that the Participant is disabled and unable to perform the substantial duties of the Participant's employment. After that, "Total Disability" means that the Participant is disabled and completely unable to engage in any occupation for wage

or profit for which the Participant is reasonably qualified by training, education or experience.

The Benefit Plan also states:

> Monthly Disability Benefits will be paid if a Participant is Totally Disabled as defined in Paragraph 1.08.

Thus, the Trustees made their decision in the context of the requirements of your professional position as UniServ Director, the restrictions placed upon you by your doctors and the accommodations offered by your employer as required by the Americans with Disabilities Act. The Board also very seriously considered your belief that you cannot perform the duties of your occupation.

REVIEW CRITERIA

When reviewing the medical documentation, the Trustees weighed all medical opinions. Although Dr. Phillip Johnson has treated you for a number of years, the file indicates that he has functioned as your family doctor and primary physician rather than as an orthopedic specialist. The conditions Dr. Johnson has treated include dizziness, vertigo, flu shot, upper respiratory infection and hip pain. The basis which you have asserted for your disability does not relate to general health problems, but rather to orthopedic complications arising out of your hip operations. Greatest weight, therefore, was given to the evidence submitted by orthopedic specialists who provided specific expertise for your condition and documented medical evidence related to it.

As you know, the Trustees were informed of the essential requirements of your position as UniServ Director from the testimony of Doyle McAllister, Associate Executive Director for Field Services, ISTA, and the ISTA job description for UniServ Director.

APPEAL DECISION

Dr. Miguel E. Cabanela is the orthopedic surgeon with the Mayo Clinic in Rochester, Minnesota, who has operated on your hip and treated you for many years. Dr. Michael Keating is an orthopedic surgeon with the Center for Hip and Knee Surgery in Mooresville, Indiana. He was asked to perform an independent medical examination.

Dr. Cabanela has performed numerous operations on you and has actually treated your orthopedic problems, and resulting limitations, for a number of years. Dr. Keating performed an independent medical examination. Because of their expertise in regard to orthopedic problems, the opinions of the two physicians were accorded greater weight by the Trustees than the opinions of the other physicians and health practitioners.

The most severe restrictions imposed by Drs. Cabanela and Keating are those which prohibit stair climbing and excessive walking. Dr. Keating has prohibited lifting, but Dr. Cabanela, as early as August, 1993, stated that you should avoid carrying in excess of 15 pounds. Neither doctor imposed limitations on driving, sedentary work or exposure to stress.

According to the testimony of Doyle McAllister, Associate Executive Director for Field Services, ISTA would make the following accommodations:

1. Provide a vehicle and equip it as required by the Americans with Disabilities Act.
2. Assure that you do not have to attend meetings that require stair climbing that would cause harm to you.
3. Accommodate a flexible schedule for "bad days."
4. Guarantee a handicapped parking spot at your place of employment.
5. All other reasonable accommodations required by the Americans with Disabilities Act.

The lifting restrictions could be handled by using a lightweight luggage carrier, asking for help or reducing the size of parcels.

The Trustees realize that you must move carefully and deliberately. However, the video of your Florida stay indicates that you are able to drive, walk, bend, carry parcels and run errands over a period of 2-3 hours. Further, your activity during the appeal hearing demonstrated your ability to endure a stressful meeting (with reasonable breaks), reach about three feet to move reports of approximately 3 pounds, and concentrate well enough to present a coherent and detailed account of your condition.

Thus, the Board of Trustees has determined that you are able to perform the major duties of your occupation. They believe that with ISTA's accommodations, you could perform the substantial duties of your employment. We realize this is not the decision you wanted. ISTA, however, is

an employee-oriented organization. Even before the Americans with Disabilities Act became law, it was their policy to accommodate employees' limitations and handicaps. Indeed, if a qualified candidate with your restrictions were to apply for the position of UniServ Director, the restrictions would not be a barrier to employment. You are, therefore, not entitled to additional benefits through the ISTA Insurance Benefit Plan, and the Trustees have denied your appeal.

Sincerely,

/s/ Bruce L. Rogers
Bruce L. Rogers
Director/Chief Executive Officer
ISTA Insurance Trust

cc: Richard Darko, Lowe Gray Steele & Hoffman